

Case C-384/21**Summary of the request for a preliminary ruling under Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

24 June 2021

Referring court:

Conseil d'État (Belgium)

Date of the decision to refer:

15 June 2021

Applicant:

Municipality of Farciennes

Defendant:

Société wallonne du logement

1. Subject matter and details of the dispute:

- 1 The société de logement de service public Sambre et Biesme (Sambre and Biesme public service housing company, Belgium; 'the SLSP Sambre et Biesme') is a cooperative society with limited liability whose main shareholders are the municipalities of Farciennes and Aiseau-Presles.
- 2 It forms part of the network of public service housing companies supervised by the société wallonne du logement (Walloon housing company, Belgium) acting on behalf of the Walloon Government.
- 3 In 2015, the SLSP Sambre et Biesme and the municipality of Farciennes decided to create an ecodistrict in Farciennes comprising approximately 150 housing units. For that purpose, the parties planned to obtain the assistance of the Intercommunale pour la Gestion et la Réalisation d'Études Techniques et Économiques (Inter-municipal Association for the Management and Implementation of Technical and Financial Projects, Belgium; 'IGRETEC').

- 4 IGRETEC performs public service tasks in several areas. Its design office and central purchasing unit enable it to assist public or private partners in the design and implementation of industrial or civic buildings, infrastructure, or more generally in any urban planning and environment project.
- 5 IGRETEC was set up by several municipalities as a limited liability cooperative society, and its members now include more than 70 municipalities, including the municipality of Farciennes, and more than 50 other public authorities.
- 6 Its operation is governed by the laws on commercial companies. Its articles of association give the municipalities the majority of votes and the chairmanship of the various management bodies. The decisions of the bodies of the inter-municipal cooperative are taken by a majority vote of the municipal members.
- 7 IGRETEC's share capital is divided into five categories of shares, mainly A shares allocated to the municipalities (5 054 351 shares) and C shares allocated to 'other public-law affiliates' (17 126 shares). At the time, no member of the board of directors represented category C members. In addition, IGRETEC's board of directors included a municipal councillor from the municipality of Farciennes who was also a director of the SLSP Sambre et Biesme.
- 8 On 29 October 2015, the SLSP Sambre et Biesme decided to buy a share in IGRETEC in order to benefit from its services as a shareholder, albeit a small minority shareholder.
- 9 A draft framework agreement was drawn up to determine the respective rights and obligations of the municipality of Farciennes and the SLSP Sambre et Biesme in the design and construction of the ecodistrict in Farciennes.
- 10 Its first article provides, in particular, for the award of joint public contracts for services, works and works promotion and for the designation of the municipality of Farciennes to act as contracting authority on their collective behalf and to take all decisions relating to procurement and the award of contracts.
- 11 Article 5 of the agreement, entitled 'choice of project management assistance for the implementation of services, works and works promotion contracts and for the execution of the urban regeneration project', states that 'the parties agree that the municipality of Farciennes is to conclude an agreement with IGRETEC ...for project management assistance, legal and environmental services, within the framework of the "in-house" relationship that unites each of the parties to the said inter-municipal cooperative'.
- 12 On 9 February 2017, the board of directors of the SLSP Sambre et Biesme decided, first, 'to approve the conclusion of a framework agreement for joint contracts with the municipality of Farciennes' and, secondly, 'not to put out to tender the public contract for asbestos inventory services', for which it had previously approved the special specifications 'in view of the in-house relationship between the [SLSP Sambre et Biesme] and IGRETEC'. Those

specifications are described as the first stage in the implementation of the ecodistrict project in Farciennes.

- 13 On 10 February 2017, those two decisions of 9 February 2017 were challenged by the Walloon Housing Company, which oversees the public service housing companies, on the grounds that the conditions of the 'in-house' exception were not met in the relationship between SLSPs (public service housing companies) and IGRETEC and that the orders placed by SLSPs with IGRETEC were subject to the public procurement regime.
- 14 On 25 February 2017, the Walloon Housing Corporation annulled the decisions of the SLSP Sambre et Biesme for having awarded the technical assistance contract (Article 5 of the framework agreement) and the asbestos inventory services contract to IGRETEC without a tender procedure.
- 15 In its view, it is reasonable to doubt that the SLSP Sambre et Biesme has a decisive influence on IGRETEC, particularly since it has only one share in IGRETEC's share capital and that, *a contrario*, IGRETEC's articles of association gives predominance to the municipalities.
- 16 The designation of the municipality of Farciennes as the lead contracting authority in Article 1 of the framework agreement is not sufficient to justify the direct award of contracts to IGRETEC, on behalf of the various parties to the framework agreement, even if the municipality of Farciennes itself benefits from the 'in-house' exception in its dealings with IGRETEC. In the context of a joint contract, the various partners join together in designing the order, but the usual contracting procedures must be followed by each partner.
- 17 That annulment decision is the subject matter of the present action.

2. The provisions at issue:

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

- 18 Article 12 provides:

'Public contracts between entities within the public sector

1. A public contract awarded by a contracting authority to a legal person governed by private or public law shall fall outside the scope of this Directive where all of the following conditions are fulfilled:

- (a) the contracting authority exercises over the legal person concerned a control which is similar to that which it exercises over its own departments;

(b) 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; and

...

A contracting authority shall be deemed to exercise over a legal person a control similar to that which it exercises over its own departments within the meaning of point (a) of the first subparagraph where it exercises a decisive influence over both strategic objectives and significant decisions of the controlled legal person. ...

2. ...

3. A contracting authority, which does not exercise over a legal person governed by private or public law control within the meaning of paragraph 1, may nevertheless award a public contract to that legal person without applying this Directive where all of the following conditions are fulfilled.

(a) the contracting authority exercises jointly with other contracting authorities a control over that legal person which is similar to that which they exercise over their own departments;

(b) more than 80% of the activities of that legal person are carried out in the performance of tasks entrusted to it by the controlling contracting authorities or by other legal persons controlled by the same contracting authorities; and

...

For the purposes of point (a) of the first subparagraph, contracting authorities exercise joint control over a legal person where all of the following conditions are fulfilled:

(i) the decision-making bodies of the controlled legal person are composed of representatives of all participating contracting authorities. Individual representatives may represent several or all of the participating contracting authorities;

(ii) those contracting authorities are able to jointly exert decisive influence over the strategic objectives and significant decisions of the controlled legal person; and

(iii) the controlled legal person does not pursue any interests which are contrary to those of the controlling contracting authorities.

4. A contract concluded exclusively between two or more contracting authorities shall fall outside the scope of this Directive where all of the following conditions are fulfilled:

(a) the contract establishes or implements a cooperation between the participating contracting authorities with the aim of ensuring that public services they have to perform are provided with a view to achieving objectives they have in common;

(b) the implementation of that cooperation is governed solely by considerations relating to the public interest; and

(c) the participating contracting authorities perform on the open market less than 20% of the activities concerned by the cooperation;’

3. The parties’ positions:

A. The municipality of Farciennes

- 19 First, the municipality of Farciennes notes that Directive 2014/24 was to be transposed by 18 April 2016 at the latest and that the Belgian legislature transposed it by a law of 17 June 2016 which, on the day the present action was brought, had still not entered into force. It notes that unconditional and sufficiently precise provisions of a directive have direct effect if they have not been transposed within the required time limits.
- 20 The municipality of Farciennes contends that the conditions for the application of the in-house exception are properly met in the present case, both in the relationship between the municipality of Farciennes and IGRETEC and between IGRETEC and the SLSP Sambre et Biesme.

First plea: ‘joint in-house’

- 21 The municipality of Farciennes notes that ‘the contracting entities will exercise over the contractor company control similar to that which they exercise over their own departments if their position under the statutes is such that they are able to influence jointly the adoption of the significant decisions and strategic objectives of that company. On any view, the contractor company cannot be exclusively controlled by the public entity which has a majority shareholding’ (Opinion of Advocate General Cruz Villalón in Joined Cases C-182/11 and C-183/11, EU:C:2012:494, point 48).
- 22 It also notes that ‘the control exercised over the concessionaire must be effective, but it is not essential that it be exercised individually’ (judgment of 13 November 2008, *Coditel Brabant*, C-324/07, EU:C:2008:621, point 46).
- 23 It states that the SLSP Sambre et Biesme has a share in the capital of IGRETEC, that that shareholding is not purely formal or symbolic, that it was not acquired in order to ‘evade the rules of public procurement’ and that it does not prevent compliance with the condition of ‘similar control’.

- 24 Referring further to the judgment of 13 November 2008, *Coditel Brabant*, C-324/07, EU:C:2008:621, it takes the view that the number of shares in the company's capital or the percentage of the shareholding of a public authority is not the decisive criterion, since the Court has already accepted that, in certain circumstances, the condition relating to the control exercised by the public authority could be fulfilled in the case where such an authority held only 0.25% of the capital of a public undertaking. It submits that the SLSP also must not have 'extraordinary powers justifying decisive influence', that it is not the proportion of the capital that is decisive, but that in assessing the criterion of similar control, account must be taken of all the relevant legal provisions and circumstances of the case.
- 25 It adds that one share is enough and that the SLSP does not necessarily have to take a shareholding with a view to investment and therefore a financial outcome linked to a number of shares.
- 26 It reiterates that it is irrelevant that the SLSP holds only a nominal share in IGRETEC, which, according to it, represents only 0.0000000197% of the shares with voting rights at the general meeting. 'The criterion of holding part of the shares cannot constitute the only means of achieving that objective, since control similar to that exercised by a contracting authority over its own departments may take a form other than a shareholding' (judgment of 18 June 2020, *Porin kaupunki*, C-328/19, EU:C:2020:483, paragraph 68).
- 27 It argues that similar control is in fact exercised jointly by all the public authorities over the bodies of the inter-municipal cooperative and that the 'municipal predominance' enshrined in IGRETEC's articles of association does not give the municipalities alone the power to control the inter-municipal cooperative. It clarifies how IGRETEC's articles of association indeed attest to the fact that public members other than the municipalities can have a decisive influence on the strategic objectives and significant decisions of the inter-municipal cooperative (the C shares allocated to members other than the municipalities give the right to vote in the general assembly, each category of member meets separately to designate a number of candidate directors corresponding to the number of mandates to be conferred on its nomination).
- 28 It notes that, as in the *Coditel Brabant* case, that predominance of the municipalities does not imply that IGRETEC has, as a result, a 'degree of independence' excluding the exercise by the SLSP of control similar to that which it exercises over its own departments, the Court of Justice having emphasised that the BRUTÉLÉ inter-municipal cooperative was constituted in the form of an inter-municipal cooperative society (which is also the case with IGRETEC), that it was not commercial in nature and that its articles of association were concerned with the performance of tasks of municipal interest without the pursuit of interests distinct from those of the public authorities which were affiliated to it. The Court also stated that it was not permissible to require the control exercised by a public authority to be individual which would have the effect of requiring a call for

competition in the majority of cases where a public authority seeks to join a grouping composed of other public authorities, such as an inter-municipal cooperative society and that such a result would not be consistent with Union rules on public procurement because it is accepted that a public authority has the possibility of performing the public interest tasks conferred on it by using its own administrative, technical and other resources, without being obliged to call on outside entities not forming part of its own departments and that that possibility for public authorities to use their own resources to perform the public interest tasks conferred on them may be exercised in cooperation with other public authorities.

- 29 It states that the *in-house* relationship between the SLSP and IGRETEC is not intended to evade the public procurement rules since the very purpose of the agreement is to decide to award joint public contracts in the context of the design and implementation of the works for the creation of the ecodistrict in Farciennes. The use of IGRETEC is aimed specifically at providing project management assistance for the implementation of those public contracts, taking into account the tasks of the inter-municipal cooperative, and there is no reason why the SLSP should be obliged to ‘open up to the market’ in order to ensure such collaboration, which it wanted to be purely public.
- 30 It also takes the view that it does not follow from the predominant position of the municipalities in the bodies of the inter-municipal cooperatives that the other public partners, such as the SLSPs, are purely minority partners with no decisive influence on the strategic objectives and significant decisions of the inter-municipal cooperatives. It refers to the case-law of the Court of Justice and argues that it is not necessary for every contracting authority to have at least one representative in the management bodies of the entity for the condition of similar control to be fulfilled. It considers that IGRETEC’s articles of association show that there is in fact joint control by all the contracting authorities that are members of IGRETEC and that control is not exercised solely by the majority shareholders, namely the municipalities. It reiterates in that regard that both IGRETEC’s articles of association and the structure of the SLSP Sambre et Biesme, whose main shareholders are the municipality of Farciennes and the municipality of Aiseau-Presles, which are also members of IGRETEC, demonstrate that the conditions for the *in-house* exception have been met, and that if that interpretation were not to be upheld, the Court of Justice should be asked to give a preliminary ruling.
- 31 According to it, in order to conclude that there is an *in-house* relationship, the SLSP also cannot be required to have at least one director on IGRETEC’s board of directors or to belong to a category of members that has a predominant role within its bodies. In its view, such requirements are not reflected in the case-law of the Court of Justice or in Article 12 of Directive 2014/24. It notes the ‘very particular circumstances of the *Econord* case’ (a contracting authority’s almost total shareholding in the controlled entity) and states that a minority shareholding is not contrary to the concept of joint control. In order to conclude that there is an *in-house* relationship in the context of similar joint control, it is sufficient,

according to it, to find that each contracting authority ‘participates’ in the capital and management bodies of that entity, which implies for the minority shareholders only that they can ‘contribute effectively’ to the control of the entity in question, without thereby having to have a director in the management body.

- 32 It observes that no contracting authority within IGRETEC has a majority in relation to the other member contracting authorities which could exercise sole control. It explains that it has shown that, in the present case, there was indeed joint control over IGRETEC by all the public authorities that are members of IGRETEC, and that it is necessary to take into account the requirements of the Code de la démocratie locale et de la décentralisation (Code on Local Democracy and Decentralisation), which requires that the municipalities dominate within the inter-municipal cooperatives. That dominance does not imply, however, that they have a ‘degree of independence’ excluding the exercise by other public authorities, such as the SLSPs, of a control similar to that which they exercise over their own departments, nor does it mean that the inter-municipal cooperatives, which are not commercial in nature, pursue interests distinct from those of the public authorities that are affiliated to them. In that respect, it notes that the two main shareholders of the SLSP Sambre et Biesme are the municipality of Farciennes and the municipality of Aiseau-Presles, which are also member municipalities in IGRETEC, the housing company being, in a way, the emanation of the tasks that the municipalities must carry out in terms of public housing.
- 33 It notes that, in *Coditel Brabant*, the Court of Justice also did not conclude that the condition of similar control was fulfilled because each municipal member of the inter-municipal cooperative had a representative in the management bodies, which gave them control, the judgment finding that it was sufficient that the board of directors of the inter-municipal cooperative in question was composed of ‘representatives of the affiliated municipalities and appointed by the general assembly’, the latter itself being composed of ‘representatives of the affiliated municipalities’.
- 34 Assuming that the Conseil d’Etat (Council of State) does not follow its analysis, the municipality of Farciennes suggests that the Court of Justice be asked in particular about the concept of joint control.
- 35 The municipality of Farciennes notes that one of its municipal councillors was, at the same time, a director on IGRETEC’s board of directors and on the board of directors of the SLSP Sambre et Biesme. It states that the specific circumstances of the case must be taken into account and reiterates that a symbolic participation is justified, since the objective pursued by the SLSP is not to make a financial investment, but to benefit from the common services and the structure of the inter-municipal cooperative. It emphasises that the Code on Local Democracy and Decentralisation limits the number of directors in an inter-municipal company and maintains that the findings of the *Econord* judgment are limited to stating that there can be no majority partner which imposes its point of view on all, *quod non*

in the present case. It states that, in the present case, similar control was exercised through the municipality of Farciennes, which is a shareholder in both IGRETEC and the SLSP Sambre et Biesme and has a director on the boards of both entities.

Second plea: 'in-house cooperation'

- 36 In the alternative, the municipality of Farciennes argues that, in the absence of joint control, Article 12(4) of the directive allows horizontal cooperation between contracting public authorities. It maintains that the cooperation between the SLSP Sambre et Biesme, the municipality of Farciennes and IGRETEC is a part of such cooperation between contracting authorities since, for the municipality and the SLSP, it is a matter of the carrying out of their joint ecodistrict project and, for IGRETEC, the carrying out of its tasks for the benefit of all its members. It is therefore, in its view, an agreement with common objectives for each of the parties. It adds that only public interests are involved while IGRETEC performs on the open market less than 20% of the activities concerned by the cooperation.
- 37 The municipality of Farciennes argues that Article 12(4) of the directive envisages the joint exercise of tasks carried out with a view to achieving common objectives, even if the tasks carried out are distinct, that the public service tasks envisaged are therefore not joint tasks and that the opposing party is mistaken when it claims that the provision in question requires that the contract should have as its purpose the joint provision of public services by means of cooperation. As for the fact that Article 12(4) refers to the 'contract' concluded exclusively between two or more contracting authorities, it notes that, according to Article 2 of the directive, the concept of 'public contracts' is to be understood as contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities, having as their object the execution of works, the supply of products or the provision of services. It takes the view that the framework agreement for joint contracts does indeed include such cooperation, since it is a contract that contributes to the creation of the new ecodistrict, which involves the construction of new housing by the SLSP Sambre et Biesme, while the municipality of Farciennes also plans to build new private housing there. It points out that the purpose of the agreement is to determine the respective rights and obligations of the parties in the context of the design and execution of those works for the creation of the Farciennes ecodistrict for which joint public contracts will be initiated, that the provisions of the agreement regulate those means of collaboration and the tasks of each of the parties within the framework of that cooperation and that one of the elements of the cooperation consists in the municipality of Farciennes concluding an agreement with IGRETEC for assistance with project management, and legal and environmental services, within the framework of the *in-house* relationship which unites each of the parties to that inter-municipal cooperative, in accordance with Article 5 of the agreement. It concludes that the task thereby entrusted to IGRETEC does indeed bring about cooperation between the SLSP Sambre et Biesme and the municipality of Farciennes, as provided for in Article 12(4)(a) of the directive. It adds that, for IGRETEC too, there is cooperation with the SLSP Sambre et Biesme and the

municipality of Farciennes, both members of the inter-municipal cooperative, and that IGRETEC's tasks include, inter alia, consultancy and management tasks. In its view, it is astounding to assert that IGRETEC does not pursue public service tasks when it is a pure inter-municipal cooperative that only has tasks of municipal interest and that it is obviously not because the creation of the ecodistrict does not appear in the object of IGRETEC's articles of association that the contract does not meet the conditions of horizontal cooperation. It thus concludes that the opposing party misunderstands the content and scope of the requirements of Article 12(4) of the directive.

- 38 The municipality of Farciennes maintains that the circumstances of the present case do indeed fall within the concept of cooperation referred to in Article 12(4) of Directive 2014/24, as clarified by the Court of Justice of the European Union in the judgment of 4 June 2020, *Remondis* (C-429/19, EU:C:2020: 436, paragraphs 32-34), which stated that 'the existence of cooperation between entities belonging to the public sector is based on a strategy which is common to the partners to that cooperation, and requires the contracting authorities to combine their efforts to provide public services', which excludes the mere reimbursement of costs, but includes 'an inherently collaborative dimension' and presupposes that 'the public sector entities which intend to conclude such an agreement establish jointly their needs and the solutions to be adopted'.
- 39 It states that in this case there was indeed a 'process of cooperation between the parties', since:
- there is an *in-house* relationship between the municipality of Farciennes and IGRETEC;
 - the municipality of Farciennes and the SLSP Sambre et Biesme are pursuing a joint project to create an ecodistrict and a housing development of around 150 private and public dwellings (with a view to social diversity), for which the municipality and the SLSP are pooling their resources (including the subsidy obtained by the SLSP);
 - The municipality of Farciennes and the SLSP Sambre et Biesme are members of IGRETEC in the 'consultancy and management and central purchasing' sector, which is why it was decided to cooperate with IGRETEC;
 - the framework agreement on joint contracts attests to that cooperation between the municipality, the SLSP Sambre et Biesme and IGRETEC and is not limited to the payment of a price by the SLSP to IGRETEC, on the understanding that it is indeed within the framework of that cooperation, because an *in-house* relationship, in any case, unites the municipality of Farciennes and IGRETEC, that the parties agreed that the municipality of Farciennes would enter into an agreement with IGRETEC for project management assistance and legal and environmental services.

- 40 The municipality of Farciennes considers that the conditions of Article 12(4) of the directive are indeed fulfilled in the present case, since that provision does not lay down, furthermore, that there must be a 'joint provision of public services' on the part of the contracting authorities, that the contracting authorities concerned are forbidden from carrying out projects for private persons, or that the cooperating partners must have, as part of their object, the particular project which is the subject of the cooperation. It adds that the cooperation envisaged in the current case only concerns the performance of services for public authorities and that, within the framework of the agreement, IGRETEC also carries out its public service tasks, and provides public services to two of its members which have become associated with the inter-municipal cooperative for the very purpose of carrying out those public service tasks.
- 41 Assuming that the Conseil d'État (Council of State) decides not to follow that analysis, the municipality of Farciennes suggests that that point be referred to the Court of Justice.

B The Walloon Housing Company

First plea: 'joint in-house'

- 42 The Walloon Housing Company notes, first of all, that Article 12(3) of Directive 2014/24, relied on by the SLSP Sambre et Biesme, does not have direct effect. It observes that only provisions which lay down a rule of conduct and, therefore, confer subjective rights on individuals, are capable of having direct effect, whereas the abovementioned provision of Directive 2014/24 does not satisfy that requirement since it does not lay down any obligation on the State to act or not to act for the benefit of an economic operator. It maintains that that provision, on the contrary, merely allows the State to refrain from putting a contract out to tender when certain conditions are met. It concludes that the SLSP Sambre et Biesme cannot not rely on that provision to justify its failure to comply with the principle of competition in the present case. If the Conseil d'Etat (Council of State) does not agree with its position, it suggests asking the Court of Justice about the direct effect of that provision.
- 43 It goes on to explain why, in its view, the conditions for a 'joint in-house' relationship between the SLSP Sambre et Biesme and IGRETEC are not met in the present case.
- 44 It observes that, according to the case-law of the Court of Justice, the contractual relationship established between two legally distinct persons can be regarded as 'in-house' when the person ordering a product or service exercises over the person providing it control similar to that which it exercises over its own departments and that that person carries out the essential part of its activities with the public authority or authorities which constitute it.

- 45 It states that the ordering entity must be a contracting authority and have a power of control such as to ‘influence that entity’s decisions [and that it] must be a case of a power of decisive influence over both strategic objectives and significant decisions’ (judgment of 13 November 2008, *Coditel Brabant*, C-324/07, EU:C:2008:621, paragraph 28), with the result that similar control implies more than mere a dominant influence, since it presupposes a control over the entity which covers both strategic choices and individual management decisions. It adds that the level of control exercised must be assessed broadly, with regard to the overall management and structures of the entity concerned, and not in relation to its specific conduct in a public procurement procedure (see judgment of 17 July 2008, *Commission v Italy*, C-371/05, not published, EU:C:2008:410).
- 46 It notes that, according to the case-law of the Court of Justice, while it is no longer required that each entity individually has the same decisive influence over the controlled entity as if it had organised the activity autonomously and internally, nor that the public entity has a majority shareholding, so that control can be exercised jointly, that is on condition in particular that there is no divergence of interests in the day-to-day management of the public service tasks entrusted to the controlled entity, that that entity is not likely to pursue objectives independently of its shareholders and that it is not, as a result, market-oriented. It states that, more recently, in the *Econord* judgment of 29 November 2012 (C-182/11 and C-183/11, EU:C:2012:758, paragraph 31), the Court refined the conditions for similar control in a ‘joint in-house’ situation by specifying that each of the contracting authorities must not only hold capital in the contractor entity but also play a role in its managing bodies, that control over the latter cannot be based solely on the controlling power of the public authority which holds a majority shareholding in the capital of the entity concerned, in so far as ‘the position of a contracting authority within a jointly owned successful tenderer does not provide it with the slightest possibility of participating in the control of that tenderer, that would, in effect, open the way to circumvention of the application of the rules of EU law regarding public contracts or service concessions, since a purely formal affiliation to such an entity or to a joint body managing it would exempt the contracting authority from the obligation to initiate a tendering procedure in accordance with the EU rules, even though it would take no part in exercising a similar control over that entity’. It notes that, in that case, the Court called on the Italian Consiglio di Stato (Council of State, Italy) to determine whether the shareholders’ agreement concluded by the contracting authorities could enable them to contribute effectively to the control of the successful tenderer (paragraph 32) in so far as they each had only one share in the successful tenderer. The Walloon Housing Company states that, in that decision, the Court wished to avoid the risk of circumvention of the public procurement rules by means of a purely formal affiliation to a common entity and confirmed its previous case-law which requires an effective structural and functional power of control over the contractor, despite the contracting authorities having a very small capital holding.
- 47 It concludes that the decision of 29 October 2015 of the board of directors of the SLSP Sambre et Biesme to acquire a share in IGRETEC was intended solely to

avoid the application of the public procurement rules and that, while the use of an entity jointly owned by several contracting authorities does not, in principle, prevent the use of the ‘in-house’ exception, that is on condition that the contracting authority which calls on that entity exercises effective structural and functional control over it, which presupposes not only holding capital in the contractor, but also playing a role in its managing bodies, and that that control is such as to have a decisive influence on the strategic objectives and significant decisions of the contractor.

- 48 It then explains how, in view of the number of shares subscribed to in IGRETEC, the holding of the SLSP Sambre et Biesme, which has only one share in IGRETEC’s share capital, is entirely nominal, since it represents, according to its calculations, only 0.000000197% of the shares giving the right to vote at the general meeting (category A, C and P members). It also notes that the SLSP Sambre et Biesme has no director on IGRETEC’s board of directors, whereas the municipalities (category A members) have been given predominance in the control of IGRETEC’s bodies. In its view, in so far as IGRETEC’s articles of association provide that category A members (municipalities) have a majority on the board of directors, their power prevents members of other categories, including the SLSP Sambre et Biesme, from participating effectively in the structural and functional control of IGRETEC and from influencing its strategic objectives and significant decisions in a decisive manner.
- 49 The Walloon Housing Company notes that the ‘in-house’ exception is to be interpreted strictly and that the burden of proof rests on the person seeking to rely on it. It notes that, in order to prove similar joint control, the decision-making bodies of the contractor must be composed of representatives of all the contracting authorities, whereas the SLSP Sambre et Biesme has no representatives on IGRETEC’s board. It adds that the Farciennes municipal councillor, who is on that board of directors, acts only as a representative of the municipality of Farciennes and not of the SLSP Sambre et Biesme. It concludes that the condition for ‘joint in-house’ control is not met.

Second plea: ‘in-house cooperation’

- 50 First of all, the Walloon Housing Company denies any direct effect for Article 12(4) of Directive 2014/24, which is aimed at ‘non-institutionalised horizontal cooperation between contracting authorities’, as that provision does not confer any subjective rights on an economic operator, since it does not impose any obligation on the State to act or not to act.
- 51 It then states that the municipality of Farciennes does not demonstrate that the three cumulative conditions of that provision are fulfilled in the present case, namely, (1) the contract establishes or implements a cooperation between the participating contracting authorities with the aim of ensuring that public services they have to perform are provided with a view to achieving objectives they have in common, (2) that the implementation of that cooperation is governed solely by

considerations relating to the public interest and (3) that the participating contracting authorities perform on the open market less than 20% of the activities concerned by the cooperation.

- 52 It argues that the contract concluded between the SLSP Sambre et Biesme, the municipality of Farciennes and IGRETEC does not constitute a contract concluded exclusively between contracting authorities with the aim of ensuring that public services they have to perform are provided with a view to achieving objectives they have in common. It points out that the purpose of the contract at issue is to provide consultancy services, entrusted to IGRETEC by the municipality of Farciennes and the SLSP Sambre et Biesme, which are carried out under their control, and that the contract does not therefore have the purpose of enabling the contracting parties to provide public services jointly by means of cooperation. It also notes that IGRETEC provides such services as a consultancy specialising in the design, execution and implementation of projects for both public and private partners, so that it does not pursue public service tasks.
- 53 It points out that, more fundamentally, the objectives pursued by the SLSP Sambre et Biesme and the municipality of Farciennes, which consist in the creation of an ecodistrict, are clearly different from IGRETEC's object.

It concludes that the contract concluded between the SLSP Sambre et Biesme, the municipality of Farciennes and IGRETEC does not meet the conditions for horizontal cooperation. In its view, IGRETEC is acting as a mere provider of services for a fee without there being any 'genuine cooperation' between the three entities, within the meaning of the case-law of the Court of Justice.

- 54 If the Conseil d'État (Council of State) does not share its position, it would be appropriate, in its view, to refer the matter to the Court of Justice

4. Findings of the Conseil d'État (Council of State):

A. The first plea: a 'joint in-house' situation

- 55 The fact that two parties to an agreement are themselves public authorities does not rule out the application of procurement rules (judgment of 18 November 1999, *Teckal*, C-107/98, EU:C:1999:562, paragraphs 50 and 51; recital 31 of Directive 2014/24). The 'in-house' relationship constitutes an exception to the application of those rules. The conditions laid down for relying on it must therefore be interpreted strictly and it is for the person relying on it to prove that those conditions are met (judgments of 13 October 2015, *Parking Brixen*, C-458/03, EU:C:2005:605, paragraph 63, and of 8 May 2014, *Datenlotsen Informationssysteme*, C-15/13, EU:C:2014:303, paragraph 23).
- 56 In a 'joint in-house' relationship, several contracting authorities own an entity and 'jointly' exercise 'similar control' over it to that exercised over their own departments.

- 57 It is clear from the case-law of the Court of Justice that the exercise of ‘similar control’ (sole or joint) means, in any event, that the contracting authority or authorities can exercise, alone or jointly, effective structural and functional control over the contractor, which should enable the contracting authority or authorities to influence decisively both the strategic objectives and the significant decisions of that contractor. The degree of the control exercised must be assessed as a whole, with regard to the overall management and structures of the entity concerned. That assessment must take account of all the legislative provisions and the relevant circumstances of the case (judgments of 13 October 2005, *Parking Brixen*, C-458/03, EU:C:2005:605, paragraph 65; of 11 May 2006, *Carbotermo and Consorzio Alisei*, C-340/04, EU:C:2006:308, paragraph 36; of 17 July 2008, *Commission v Italy*, C-371/05, not published, paragraph 24; of 13 November 2008, *Coditel Brabant*, C-324/07, EU:C:2008:621, paragraph 28; of 10 September 2009, *Sea*, C-573/07, EU:C:2009:532, paragraph 65; and of 8 May 2014, *Datenlotsen Informationssysteme*, C-15/13, EU:C:2014:303, paragraph 24).
- 58 In addition, according to the Court’s case-law, the fact that the decision-making bodies of the contractor are composed of representatives of the contracting authority or authorities shows that the latter have control over those decision-making bodies and are thus able to exert decisive influence over both the strategic objectives and the significant decisions of that contractor (judgment of 13 November 2008, *Coditel Brabant*, C-324/07, EU:C:2008:621, paragraph 34).
- 59 With particular regard to the case of similar control exercised ‘jointly’ by several contracting authorities, it is clear from the Court’s case-law that the holding by one of the contracting authorities of a purely nominal share in the contractor does not, in itself, allow the condition of ‘similar control’ to be regarded as not fulfilled in respect of that authority (judgment of 19 April 2007, *Asemfo*, C-295/05, EU:C:2007:227, paragraphs 58 to 61).
- 60 However, in order to be able to claim ‘joint similar control’, the SLSP Sambre et Biesme itself recognises that the contracting authority must show that it is able to participate in some way in the control of the contractor. However, the SLSP Sambre et Biesme does not establish the fact that it has any control over IGRETEC. The contested act states, in that respect, that ‘IGRETEC’s articles of association give greater importance to its municipal members (category A) to the detriment of the other public entities (category C)’, that ‘the members of category C – of which the SLSP Sambre et Biesme is one – are not guaranteed to be represented by their own members on the board of directors and have as many votes as they have shares’, that ‘a very small share in IGRETEC’s share capital results in ... little influence’, that ‘only the members which are municipalities have the possibility of blocking decisions at the general meeting’, that ‘IGRETEC’s articles of association clearly grant substantial powers of control to the municipalities (category A)’ and that ‘IGRETEC’s articles of association currently give predominance to the municipalities, so that the SLSP Sambre et Biesme is not able to prove that the other public members also have a real and decisive influence’.

- 61 It is apparent from the judgment of 29 November 2012, *Econord* (C-182/11 and C-183/11, EU:C:2012:758, paragraphs 31 and 33) that, in order to rely on ‘joint similar control’, it is necessary that the contracting authority ‘not only holds capital in that entity but also plays a role in its managing bodies’, so as to be able to ‘contribute effectively to the control’ of that entity. The Court points out that the concept of ‘joint control’ is not to be rendered meaningless and states that ‘where the position of a contracting authority within a jointly owned successful tenderer does not provide it with the slightest possibility of participating in the control of that tenderer, that would, in effect, open the way to circumvention of the application of the rules of EU law regarding public contracts or service concessions, since a purely formal affiliation to such an entity or to a joint body managing it would exempt the contracting authority from the obligation to initiate a tendering procedure in accordance with the EU rules, even though it would take no part in exercising the “similar control” over that entity’.
- 62 The question arises, however, as to what extent and in what way the contracting authority must ‘play a role’ in the managing bodies of the controlled entity and ‘contribute effectively to the control’. In its judgment of 8 May 2014, *Datenlotsen Informationssysteme* (C-15/13, EU:C:2014:303, paragraph 28), the Court held that there is no relationship of control between the contracting authority and the contractor where the contracting authority holds no share in the capital of that entity and ‘has no legal representative in its management bodies’.
- 63 Article 12(3) of Directive 2014/24 appears to clarify the concept of ‘participation’ in the decision-making bodies of the controlled entity by providing:
- ‘the decision-making bodies of the controlled legal person are composed of representatives of all participating contracting authorities. Individual representatives may represent several or all of the participating contracting authorities.’
- 64 In the present case, on 29 October 2015, the SLSP Sambre et Biesme acquired a share in IGRETEC for EUR 6.20 in order to benefit directly from the latter's services. That single share represented, as at 31 December 2015, 0.0000049% of the 20 366 778 shares of the inter-municipal cooperative and 0.0000197% of the 5 071 477 shares entitled to vote at the general meeting. It is also clear from those documents that, at the same time, the ‘category C’ members together represented 0.084% of the shares in the inter-municipal cooperative and 0.34% of the shares carrying voting rights at the general meeting. The ‘category C’ members, and in particular the SLSP Sambre et Biesme, were therefore in the position of being a very small minority of shareholders in IGRETEC.
- 65 That very small minority position does not enable the category C members to contribute effectively to the control of IGRETEC. Moreover, the articles of association gave, in all respects and in all decision-making bodies, predominance to the municipalities (category A members). The statement of the SLSP Sambre et Biesme that the category C members were represented on the board of directors of

IGRETEC cannot be accepted. Given the limited number of directors, the small minority position of the category C members does not de facto enable them to have a director to represent them within that body while IGRETEC's articles of association did not in any way guarantee the presence of a director nominated by the category C members to represent them. It is thus quite rightly pointed out in the contested measure that 'the category C members, of which the SLSP Sambre et Biesme is one, are not assured of being represented by their own members on the board of directors'. It can be concluded from the above that the category C members, including the SLSP Sambre et Biesme, do not participate in any way at all in the exercise of joint control over IGRETEC.

- 66 However, the SLSP Sambre et Biesme argued in the course of the proceedings that, at the material time, a local councillor of the municipality of Farcennes, who was also a director of the SLSP Sambre et Biesme, sat on the IGRETEC board of directors. However, the SLSP Sambre et Biesme was unable to show that that configuration was provided for and guaranteed by law. Moreover, that person sat on the IGRETEC board of directors in his capacity as 'municipal councillor in Farcennes'. There is nothing to suggest that that person was, in that capacity, also deemed to represent the interests of the SLSP Sambre et Biesme, notwithstanding the fact that that person was, in fact, also a director of that company.
- 67 The SLSP Sambre et Biesme maintains, however, that that state of affairs is sufficient to demonstrate its 'participation' in IGRETEC's decision-making bodies and to consider that it exercises 'joint similar control' over that inter-municipal cooperative through the municipality of Farcennes, which is a shareholder in both IGRETEC and the SLSP and has a director in each of those entities. It notes, in that respect, that the determination of such control must be assessed *in concreto*, taking into account the circumstances of the case, and that it is sufficient that such control takes place, regardless of the manner in which it is actually exercised.
- 68 It is appropriate to refer a question to the Court of Justice on this issue. It should be noted, however, that while the SLSP Sambre et Biesme submits that the municipality of Farcennes is a shareholder in both the SLSP Sambre et Biesme and IGRETEC and exercises control over those two entities, it does not claim the existence of a 'collateral in-house' relationship, which allows two entities controlled by the same contracting authority to conclude contracts with each other without prior competition. In any event, that type of control can apparently be satisfied only where the two co-contracting entities are controlled on an exclusive basis by the same authority (Opinion of Advocate General Mengozzi in *Datenlotsen Informationssysteme* (C-15/13, EU: C:2014:23, paragraphs 44 and 45), *quod non* in the present case, as the inter-municipality of Farcennes only holds IGRETEC and the SLSP Sambre et Biesme jointly with other public shareholders and, as regards the latter entity, even private ones.
- 69 The parties to the dispute seem in addition to consider that the answer to the question posed could differ depending on whether or not Article 12(3) of Directive 2014/24, in force at the time the facts arose, is recognised as having

direct effect. It is therefore appropriate also to ask the Court of Justice whether such an effect should be recognised for that provision, given that, in its judgment of 3 October 2019, *Irgita* (C-285/18, EU:C:2019:829, paragraphs 46 and 49), the Court, without ruling on the direct effect of Article 12 of that directive, has already held, in relation to paragraph 1 of that provision, that it cannot compel Member States to have recourse to an ‘in-house’ transaction where the conditions laid down in that provision are fulfilled and that it is open to a Member State to impose on a contracting authority conditions not laid down by Article 12(1) if it is to conclude an in-house transaction.

- 70 In that respect, the Conseil d’État (Council of State) refers the first three questions set out below.

B The second plea: ‘in-house cooperation’

- 71 The municipality of Farciennes relies, in the alternative, on the existence of horizontal cooperation between contracting authorities in terms of Article 12(4) of Directive 2014/24.
- 72 As already stated in the examination of the first plea, the law transposing Directive 2014/24 was not yet in force at the time of the facts at issue, and the time limit for transposing it had already expired. It will therefore first be necessary to ask the Court of Justice whether Article 12(4) of the directive should be recognised as having direct effect.
- 73 Horizontal public-public collaboration is an exception to the application of the public procurement rules. As is the case for ‘in house’ relationships, the conditions laid down for claiming such collaboration must be interpreted strictly and it is for the party claiming it to provide proof that the conditions are met.
- 74 Among the conditions for claiming horizontal cooperation, Article 12(4) of Directive 2014/24 requires, *inter alia*, that the ‘contract’ must establish or implement a ‘cooperation’ between the ‘participating contracting authorities’ with the aim of ensuring that public services they have to perform are provided with a view to achieving objectives which they have in common.
- 75 In its judgment of 28 May 2020, *Informatikgesellschaft für Software-Entwicklung* (C-796/18, EU:C:2020: 395, paragraphs 57-60), the Court of Justice clarified that Article 12(4) of Directive 2014/24 simply ‘mentions common objectives, without requiring the joint provision of a single public service or that the public service activity be provided in common by public entities participating in the cooperation’, since, as is stated in recital 33 of the directive, ‘the services provided by the various participating authorities [in such cooperation] need not necessarily be identical; they might also be complementary’. The Court concludes that Article 12(4) of Directive 2014/24 ‘must be interpreted as indiscriminately authorising the participating contracting authorities to carry out a public service task, either jointly or each individually, provided their cooperation makes it

possible to achieve objectives they have in common' and that 'cooperation between public entities can cover all types of activities related to the performance of services and responsibilities assigned to or assumed by the participating authorities'. The Court further clarified that the expression 'all types of activities' can 'potentially cover an activity ancillary to a public service as long as that ancillary activity contributes to the effective performance of the public service task to which the cooperation between the participating contracting authorities relates'.

- 76 In the judgment of 4 June 2020, *Remondis* (C-429/19, EU:C:2020:436, paragraphs 32-34), the Court of Justice recalled that Article 12(4) of Directive 2014/24 and the exclusion provision provided for therein are conditional on the existence of 'genuine cooperation' between the participating contracting authorities: 'the conclusion of a cooperation agreement between parties in the public sector must be discernible as the culmination of a process of cooperation between the parties to the agreement (see, to that effect, judgment of 9 June 2009, *Commission v Germany*, C-480/06, EU:C:2009:357, paragraph 38). The development of cooperation between entities belonging to the public sector has an inherently collaborative dimension, which is not present in a public procurement procedure falling within the scope of the rules laid down by Directive 2014/24. Accordingly, drawing up a cooperation agreement presupposes that the public sector entities which intend to conclude such an agreement establish jointly their needs and the solutions to be adopted. By contrast, that stage of assessing and establishing needs is, as a general rule, unilateral in the case of the award of a normal public contract. In the latter case, the contracting authority does no more than launch a call for tenders setting out the specifications which it has itself drawn up. It follows that the existence of cooperation between entities belonging to the public sector is based on a strategy which is common to the partners to that cooperation and requires the contracting authorities to combine their efforts to provide public services' (emphasis added).
- 77 In the present case, the municipality of Farciennes and the SLSP Sambre et Biesme are the only parties to the framework agreement for joint contracts for services, works and works promotion relating to the design and execution of work on the creation of the ecodistrict in Farciennes. IGRETEC is not a party to that agreement. It is true that the activities of project management assistance, legal and environmental advice, which are entrusted to IGRETEC, are part of the public service tasks of which it must ensure the implementation and for which that inter-municipal cooperative was created. However, the mere fact that it carries out those tasks within the framework of the agreement concluded between the municipality of Farciennes and the SLSP Sambre et Biesme for carrying out an ecodistrict project in Farciennes does not mean that IGRETEC itself is cooperating in the project or that it is pursuing a common objective with the parties to that agreement.
- 78 It can be concluded from those various factors that IGRETEC cannot be considered a 'party to a cooperation agreement' which 'presupposes that the

entities ...establish jointly their needs and the solutions to be adopted’, ‘is based on a strategy which is common to the partners to that cooperation’, ‘requires the contracting authorities to combine their efforts to provide public services’ and the conclusion of which is ‘discernible as the culmination of a process of cooperation’.

- 79 However, the commune of Farciennes seems to maintain that the tasks of project management assistance, and legal and environmental services entrusted to IGRETEC may meet the conditions of Article 12(4) of Directive 2014/24, on the grounds that those tasks are part of a cooperation between the SLSP Sambre et Biesme and the municipality of Farciennes, that, in any case, a ‘joint in-house’ relationship unites the municipality of Farciennes and IGRETEC and that the municipality and the SLSP Sambre et Biesme are members of IGRETEC, specifically in the ‘consultancy and management and central purchasing’ sector. The Conseil d’État (Council of State) refers, in that respect, the fourth and fifth questions.

5. The questions referred:

- 80 The Conseil d’État (Council of State) refers the following questions:

1) Must Article 12(3) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014, as amended by Commission Delegated Regulation (EU) 2015/2170 of 24 November 2015 on public procurement and repealing Directive 2004/18/EC to be interpreted as having direct effect?

2) If the answer to the first question is in the affirmative, must Article 12(3) of Directive 2014/24/EU be interpreted as meaning that the requirement for a contracting authority, in this case a public service housing company, to be represented on the decision-making bodies of the controlled legal person, in this case an inter-municipal cooperative society, is satisfied solely on the basis that a person who sits on the board of directors of that inter-municipal cooperative society in his or her capacity as a municipal councillor of another participating contracting authority, in this case a municipality, is, due to purely factual circumstances and without any legal guarantee of representation, also a director of the public service housing company, while the municipality is a (non-exclusive) shareholder in both the controlled entity (inter-municipal cooperative society) and the public service housing company?

3) If the answer to the first question is negative, must it be considered that a contracting authority, in this case a public service housing company, ‘participates’ in the decision-making bodies of the controlled legal person, in this case an inter-municipal cooperative society, solely on the basis that a person who sits on the board of directors of that inter-municipal cooperative society in his or her capacity as a municipal councillor of another participating contracting authority, in this case a municipality, is, due to purely factual circumstances and without any legal guarantee of representation, also a director of the public service housing company,

while the municipality is a (non-exclusive) shareholder in both the controlled entity (inter-municipal cooperative society) and the public service housing company?

4) Must Article 12(4) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014, as amended by Commission Delegated Regulation (EU) 2015/2170 of 24 November 2015 on public procurement and repealing Directive 2004/18/EC, be interpreted as having direct effect?

5) If the answer to that question is in the affirmative, must Article 12(4) of Directive 2014/24/EU be interpreted as meaning that it allows tasks of project management assistance and legal and environmental services to be entrusted, without a prior call for competition, to a contracting authority, in this case an inter-municipal cooperative society, where those tasks form part of a cooperation between two other contracting authorities, in this case a municipality and a public service housing company, where it is not disputed that the municipality exercises 'joint *in-house*' control over the inter-municipal cooperative society and where the municipality and the public service housing company are members of the inter-municipal cooperative society in the 'consultancy and management and central purchasing' sector of its object, which is specifically concerned with the tasks they wish to entrust to it, which tasks correspond to activities carried out on the market by consultancy and management firms specialising in the design, execution and implementation of projects?

WORKING DRAFT