

Case C-383/21**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:

Société de Logement de Service Public Sambre et Biesme SCRL

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 Cooperative for the Management and Implementation of Technical and Financial Projects, Belgium; 'IGRETEC').

- 4 IGRETEC performs public service tasks in several fields. Its consultancy and central purchasing unit enable it inter alia 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 orders placed by SLSPs with IGRETEC were subject to the public procurement regime.
- 14 On 25 February 2017, the Walloon Housing Company 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.'

3. The parties' positions:

A. *The SLSP Sambre et Biesme*

- 19 The SLSP Sambre et Biesme submits that the contested measure wrongly denied the 'in-house' relationship between it and IGRETEC. It states that that exception is enshrined in Article 12 of Directive 2014/24 which consolidates the case-law of the Court of Justice. It argues that, contrary to what is stated in the contested measure, the conditions for the 'in-house' exception are fulfilled in the present case. In particular, it argues that the contracting authority exercises jointly with other contracting authorities a control over IGRETEC which is similar to that which they exercise over their own departments, which means that: (1) the decision-making bodies of the controlled legal person are composed of representatives of all the participating contracting authorities, it being possible for an individual representative to represent several or all of the participating contracting authorities, and (2) those contracting authorities are able to jointly exert decisive influence over the strategic objectives and significant decisions of the controlled legal person.
- 20 It argues that all the required conditions are fulfilled in the present case, since it exercises jointly with other contracting authorities, in particular SLSPs and municipalities, a control over IGRETEC 'similar to that which they exercise over their own departments' and since it 'not only holds capital in IGRETEC but also plays a role in its managing bodies' (judgment of 29 November 2012, *Econord*, C-182/11 and C-183/11, EU:C:2012:758, paragraph 33).
- 21 Furthermore, it submits that Article 12(3) of Directive 2014/24 in fact had direct effect at the time the contested measure was adopted and that it is therefore appropriate to apply that provision in order to determine the conditions for joint similar control.
- 22 It submits, first, that, according to the case-law of the Court of Justice, it is irrelevant that it holds only one share in IGRETEC's capital and that that share represents, according to it, only 0.0000000197% of the shares giving voting rights at the general meeting.
- 23 Secondly, it adds that, in accordance with Article 12(3) of Directive 2014/24, it is not necessary for each organising authority to have a director on the board of directors, but it is sufficient for the organising authorities to be represented on the decision-making bodies of the inter-municipal cooperative, since an individual representative may represent several or all of the participating contracting authorities. It states that the European legislature has thus relaxed the conditions resulting from the *Econord* judgment, which required that each of the public authorities 'not only holds capital in that entity, but also plays a role in its managing bodies'. It explains that IGRETEC's articles of association, in the version applicable to the case in question, provide in Article 13(4)(iii) that 'each category of members shall meet separately to designate a number of candidate

directors, corresponding to the number of mandates to be conferred on its nomination’, that category C members, to which the SLSP Sambre et Biesme belongs, are therefore indeed represented on IGRETEC’s board of directors and that the board is therefore in fact composed of persons representing, inter alia, the SLSP Sambre et Biesme, in accordance with the condition provided for in point (i) of the second subparagraph of Article 12(3) of Directive 2014/24.

- 24 Thirdly, it argues that, in accordance with Article 12(3) of Directive 2014/24, it exercises jointly with the other contracting authorities (municipalities and other SLSPs) present within IGRETEC, control over that inter-municipal cooperative which is similar to that which they exercise over their own departments, namely, a decisive influence on the strategic objectives and significant decisions of the inter-municipal cooperative. It observes that no contracting authority within IGRETEC has a majority holding, so that the scenario mentioned in paragraph 30 of the *Econord* judgment does not arise in the present case. It adds that Article 12(3) of Directive 2014/24 refers to other contracting authorities within the controlled entity and that the creation of different categories of members does not prevent all the contracting authorities from exercising joint control over that entity. As evidence, it cites the fact that it is carrying out the project in question in collaboration with the municipality of Farciennes, which is a different category of member. The SLSP Sambre et Biesme adds that its two main shareholders are the municipality of Farciennes and the municipality of Aiseau-Presles, which are also members of IGRETEC, and concludes from this that the municipality of Farciennes, a category A member, exercises control over the SLSP Sambre et Biesme, a category C member of IGRETEC, that those two entities exercise joint control over IGRETEC, that together they are able to exert a decisive influence over the strategic objectives and significant decisions of the inter-municipal cooperative and that, moreover, it is on that basis that they intend to develop jointly an ecodistrict by calling on IGRETEC’s expertise.
- 25 It concludes from this that it not only holds capital in IGRETEC but also plays a role in its managing bodies with the result that it does exercise similar control in terms of Article 12(3) of Directive 2014/24 and the case-law developed by the Court of Justice and that there is indeed an ‘in-house’ relationship with IGRETEC.
- 26 The SLSP Sambre et Biesme notes that a municipal councillor of the municipality of Farciennes was both a director on the board of IGRETEC and on the board of the SLSP Sambre et Biesme. It states that the specific circumstances of the case must be taken into account and reiterates that a nominal 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 structure of the inter-municipal cooperative. It emphasises that the Code de la démocratie locale et de la décentralisation (the Code on Local Democracy and Decentralisation) restricts the number of directors of an inter-municipal cooperative and maintains that the findings of the *Econord* judgment are limited to stating that there can be no majority partner which imposes its views on all, *quod non* in the present case. It

states that, in the case at hand, the similar control is 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 those two bodies.

B The Walloon Housing Company

- 27 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, Belgium) does not agree with its position, it suggests asking the Court of Justice about the direct effect of that provision.
- 28 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.
- 29 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.
- 30 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 a mere dominant influence, since it presupposes 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).
- 31 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.

- 32 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.
- 33 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.

- 34 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.

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

- 35 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).
- 36 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.
- 37 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).

- 38 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).
- 39 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).
- 40 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 measure 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’.
- 41 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’.

- 42 The question arises, however, as to what extent and in what way the contracting authority must ‘participate’ 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’.
- 43 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’.
- 44 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.
- 45 That position of being a very small minority 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.

- 46 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 Farciennes, 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 Farciennes’. 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.
- 47 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 Farciennes, which is a shareholder in both IGRETEC and the SLSP and has a director in each of those entities. In that respect it notes 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.
- 48 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 Farciennes 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, points 44 and 45), *quod non* in the present case, as the municipality of Farciennes only holds IGRETEC and the SLSP Sambre et Biesme jointly with other public shareholders and, as regards the latter entity, even private ones.
- 49 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.

5. Questions referred:

50 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 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?