OPINION OF ADVOCATE GENERAL GEELHOED

delivered on 12 January 2006 [1]

I — Introduction

1. In this reference for a preliminary ruling, the Tribunale amministrativo regionale per la Puglia (Regional Administrative Court for Apulia) (Italy) seeks a ruling from the Court on whether national legislation permitting a contract for the provision of a local public transport service to be awarded directly to an undertaking owned and controlled by the public award body is compatible with Community law. This is another case in which the Court is requested to clarify the scope of its judgment in *Teckal*. [2]

2. The Court held, at paragraph 49 of that judgment, that the existence of a public supply contract within the meaning of Council Directive 93/36/EEC [3] requires inter alia an agreement between two distinct persons.

3. In this connection, the Court noted in paragraph 50 of the judgment that:

'... it is, in principle, sufficient if the contract was concluded between, on the one hand, a local authority and, on the other, a person legally distinct from that local authority. The position can be otherwise only in the case where the local authority exercises over the person concerned a control which is similar to that which it exercises over its own departments and, at the same time, that person carries out the essential part of its activities with the controlling local authority or authorities.'

II — Law

4. In Italian law, Article 113 of Legislative Decree No 267/00 was amended by Article 14 of Decree Law No 269/03. The resulting

1 — Original language: French.

2 — Case C-107/98 [1999] ECR I-8121.

3 — Directive of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1).

new version of paragraph V of Article 113 provides:

'The service contract is awarded in accordance with the rules of the sector and the legislation of the European Union, with entitlement to provide the service being granted to:

(a) joint stock companies selected by means of public and open tendering procedures;

(b) companies with mixed public and private ownership in which the private partner is selected by means of public and open tendering procedures that have ensured compliance with domestic and Community legislation on competition in accordance with guidelines issued by the competent authorities in specific regulations or circulars;

(c) companies belonging entirely to the public sector on condition that the public authority or authorities holding the share capital exercise over the company control comparable to that exercised over their own departments and that the company carries out the essential part of its activities with the controlling public authority or authorities.'

III — The dispute in the main proceedings and the question referred for a preliminary ruling

5. By decision of 17 July 2003, the Municipality of Bari launched the procedure for a public tender for the award of the contract for local transport services in the territory of the Municipality of Bari. By decision of 18 December 2003, it then decided not to go through with the tendering procedure and awarded the contract in question to AMTAB Servizio SpA by direct agreement.

6. It is apparent from the referring decision that the Municipality of Bari adopted its new decision following the entry into force of Article 14 of Decree Law No 269/03, amending paragraph V of Article 113 of Legislative Decree No 267/00.

7. In particular, the new paragraph V(c) of Article 113 — describing the 'internal'

management of a public service in accordance with the definition provided by the Court at paragraph 50 of its judgment in *Teckal*, and from which it follows that the 'internal' management of a public service does not fall within the scope of Community law on calls for tender — is what led the municipal authority of Bari not to go through with the procedure for a public tender.

8. According to the order for reference, the concessionaire AMTAB Servizio SpA is a company the share capital of which is wholly owned by the Municipality of Bari and whose sole activity is the provision of a local transport service in the city of Bari. This company is wholly controlled by the municipal authority of Bari under the service contract binding these two entities.

9. The applicant in the main proceedings, the Associazione nazionale autotrasporto viaggiatori, lodged an appeal before the national court seeking annulment of the decision of the Municipality of Bari of 18 December 2003 to award the service contract in question to AMTAB Servizio SpA on the ground that the Municipality was in breach of Community law, and in particular Articles 3 EC, 16 EC, 43 EC, 49 EC, 50 EC, 51 EC, 70 EC, 71 EC, 72 EC, 81 EC, 82 EC, 86 EC and 87 EC.

10. In the light of these arguments, the Tribunale amministrativo regionale di Puglia stayed proceedings and referred the following question to the Court for a preliminary ruling:

'Is the part of paragraph V of Article 113 of Legislative Decree No 267/00, as amended by Article 14 of Decree Law No 269/03, that sets no limit on the freedom of a public authority to choose between the different methods of awarding a contract for the provision of a public service, and, in particular, between an award as a result of a public and open tendering procedure and direct award to a company wholly controlled by the authority, compatible with Community law, and, in particular, with the obligations to ensure transparency and freedom of competition pursuant to Articles [43] EC, 49 EC and 86 EC?'

IV — Assessment

11. Do Articles 43 EC, 49 EC and 86 EC preclude national legislation, such as that set out in the question for a preliminary ruling, from giving local authorities the freedom to choose either to entrust with the management of a service, such as public transport, a company attached to the local authority in question or to initiate a procedure for a public tender to award the contract for this service to a private party?

12. That is the tenor of the question raised by the national court, the resolution of which, in the light of recent and indeed very recent case-law of the Court, does not pose particular difficulties. [4]

13. According to the documents relating to the case in the main proceedings, lodged with the Court Registry, the service in question is remunerated, at least in part, through the purchase of tickets by users, so that the relevant service concession falls not within the ambit of the Community directives on public contracts, but directly within the provisions of primary law, more particularly the fundamental freedoms laid down in the Treaty. [5] The national court appears to have made the same finding, since its question for a preliminary ruling refers only to Articles 43, [6] 49 and 86 EC, and not to Directive 92/50/EEC. [7]

14. The most important elements of the reply are to be found in paragraph 50 of *Teckal* and paragraph 49 of *Stadt Halle and RPL Lochau*. According to those judgments, a call for tenders is not mandatory, even though the other contracting party is an entity legally distinct from the contracting authority, where the public authority which is a contracting authority exercises over the separate entity concerned a control which is similar to that which it exercises over its own departments and that entity carries out the essential part of its activities with the controlling public authority or authorities. [8]

15. It is evident from a comparison of the wording of the new version of paragraph V(c) of Article 113 of Legislative Decree No 267/00 ('companies belonging entirely to the public sector on condition that the public authority or authorities holding the share capital exercise over the company control comparable to that exercised over their own departments and that the company carries out the essential part of its activities with the controlling public authority or authorities') with the passages of the Court's case-law cited in the paragraph above that the Italian legislature has clearly followed this case-law.

16. This has been confirmed by the Commission of the European Communities, which points out, in its written observations, that the current drafting of paragraph V(c) of Article 113 is the result of infringement

4 — *Teckal*; Case 26/03 *Stadt Halle and RPL Lochau* [2005] ECR I-1; Case C-231/03 *Coname* [2005] ECR I-7287; Case C-458/03 *Parking Brixen* [2005] ECR I-8585; Case C-29/04 *Commission* v *Austria* [2005] ECR I-9705.

5 — *Coname*, at paragraph 16.

6 — In the question for a preliminary ruling the national court cites Article 46 EC, and not Article 43 EC. It may be concluded, from reading the referring decision as a whole, that this is a material error.

7 — Council Directive of 18 June 1992, relating to the coordination of procedures on the award of public service contracts (OJ 1992 L 209, p. 1).

8 — See also *Commission* v *Austria*, at paragraph 34.

proceedings brought by the Commission against the Italian Republic.

17. Given that the national legislation is consistent with the Court's case-law, any decision taken by a local authority which in turn is in line with that legislation must also be considered to be consistent with Community law.

18. In that connection, it should however be noted that the criteria for defining a situation as 'internal' are to be strictly applied. It follows inter alia from the judgments cited above in *Parking Brixen* and *Commission* v *Austria* that, first, the control exercised by the contracting authority should not be diluted by the participation, 'even as a minority', of a private undertaking in the capital of the company to which management of the relevant service has been entrusted, and secondly, that company must carry out the essential part of its activities with the controlling public authority or authorities.

19. The facts underlying the main proceedings seem to me to satisfy these two criteria so that I would be in a position to conclude my analysis with this finding were it not for a third criterion deriving from the judgment in *Commission* v *Austria*,[9] namely the requirement that the first two criteria be met on a continuous basis.

20. Where, having met the first two criteria at the time of awarding the management of the relevant service, the competent authority transfers even a minority share of the company concerned to a private company, this would result — by means of an artificial construction comprising several distinct phases, namely the establishment of the company, the award to that company of the management of the public transport service and the transfer of part of its shares to a private company — in a public service concession being awarded to a semi-public company without a prior call for competition.

21. The same reasoning applies to a situation in which the original concessionaire is awarded contracts for other public services, without a prior call for competition, by public authorities other than that which controls it.

22. In the two situations described above, the principles of equal treatment, non-discrimination and transparency, as recalled by the Court in its judgments in *Coname* and *Parking Brixen*, would not be observed.

9 — See paragraphs 38 to 42.

V — Conclusion

23. In the light of the observations above, I propose that the Court answers the question referred by the Tribunale amministativo regionale per la Puglia as follows:

Articles 43 EC, 49 EC and 86 EC are to be interpreted as not precluding the application of a provision such as paragraph V of Article 113 of the Italian Legislative Decree No 267/00 in its current wording, provided that the two criteria it lays down, namely that the concessionaire must be subject to a control similar to that which the authority exercises over its own departments and that it must carry out the essential part of its activities with the controlling public authority, continue to be fulfilled on a lasting basis after the concessionaire has been awarded the contract for the management of a public service.