OPINION OF ADVOCATE GENERAL STIX-HACKL delivered on 23 September 2004 [1]

I — Introduction

1. This reference for a preliminary ruling raises, essentially, two problems of procurement law: what protection does the law afford in the event of direct procurement (that is, where no formal tendering procedure is conducted), and what conditions attach to the exception in respect of what has been termed 'quasi-in-house procurement'? That second question goes to the interpretation of the judgment in *Teckal*. [2]

II — Legal background

2. The questions referred concern the interpretation of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts [3] ('Directive 89/665') and of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts [4] ('Directive 92/50').

3. Article 1(1) of Directive 89/665, in the version in force at the material time, reads:

'The Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of Directives 71/305/EEC, 77/62/EEC and 92/50/EEC, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible, in accordance with the conditions set out in the following Articles, and, in particular, Article 2(7), on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law.'

1 — Original language: German.

2 — Case C-107/98 [1999] ECR I-8121.

3 — OJ 1989 L 395, p. 33, amended by Article 41 of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1).

4 — OJ 1992 L 209, p. 1, amended on a number of occasions.

4. Article 1(a) of Directive 92/50 reads — in part — thus:

'For the purposes of this Directive:

(a) *public service contracts* shall mean contracts for pecuniary interest concluded in writing between a service provider and a contracting authority ...'.

5. Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors ('Directive 93/38') [5] was also cited before the national court. Article 13(1) of that directive reads:

'1. This Directive shall not apply to service contracts which:

(a) a contracting entity awards to an affiliated undertaking;

(b) are awarded by a joint venture formed by a number of contracting entities for the purpose of carrying out a relevant activity within the meaning of Article 2 (2) to one of those contracting entities or to an undertaking which is affiliated with one of these contracting entities,

provided that at least 80% of the average turnover of that undertaking with respect to services arising within the Community for the preceding three years derives from the provision of such services to undertakings with which it is affiliated.

Where more than one undertaking affiliated with the contracting entity provides the same service or similar services, the total turnover deriving from the provision of services by those undertakings shall be taken into account.'

III — Facts and proceedings before the national court

6. Stadt Halle (City of Halle) started planning in early 2001 with a view to having the pretreatment and recovery or disposal of the waste it was required to treat, and potentially the waste it was not required to treat, done by a municipally controlled operator. By decision of 12 December 2001, the City of

5 — OJ 1993 L 199, p. 84, amended on a number of occasions.

Halle awarded RPL Recyclingpark Lochau GmbH ('RPL') a contract to plan, obtain technical approval for and construct the establishment of the Thermische Abfallbeseitigungs- und Verwertungsanlage (thermal waste disposal and recovery plant, 'TABVA') in Lochau. At the same time the City of Halle decided, without first carrying out a formal procurement procedure, to conclude a contract with RPL for dealing with the residual waste of the City of Halle with effect from 1 June 2005. The contract, a draft of which had already been produced, would far exceed the threshold for such service contracts. The City of Halle also intends, in order to ensure that the capacity of the plant is sufficiently used, to enter into agreements with two neighbouring local authorities under which those authorities would transfer to the City of Halle the task of treating and recovering waste, so that the residual waste of those districts would ultimately also be treated in the TABVA operated by RPL. The City of Halle presumes that this is an 'in-house' transaction that does not come under the duty to conduct an award procedure.

7. RPL was established in 1996; it is a semi-public body in the form of a limited liability company. 75.1% of its shares are owned by Stadtwerke Halle GmbH (whose sole shareholder, Verwaltungsgesellschaft für Versorgungs- und Verkehrsbetriebe der Stadt Halle mbH, is wholly owned by the City of Halle), while 24.9% are owned by a private undertaking, RWE Umwelt Sachsen-Anhalt mbH. It was not until the end of 2001 that the current shareholdings were agreed and incorporated in the company's statutes in connection with the intended award of the contract for waste disposal services from 1 June 2005. According to its statutes, RPL's objects are the operation of recycling and waste disposal facilities (in particular the operation of facilities for composting organic waste, and treating construction site and industrial waste) and the construction and operation of facilities for treating and recycling sewage, recycling seepage water, gas from waste dumps and biogas and thermal waste recycling.

8. The statutes stipulate that shareholders' resolutions require a simple majority, except for certain decisions, including the appointment of the company's two directors, where a 75% majority is required. The company's management has to deliver a report to the shareholders each month, pursuant to Stadtwerke Halle GmbH's internal reporting rules. Certain transactions and measures, including the conclusion and amendment of operators' contracts, and any capital investment and borrowing operation in excess of a set amount, require approval by the shareholders' general meeting. At present, the commercial and technical management of RPL's business is contracted out to another undertaking. The oversight functions proper

to a supervisory board are carried out by the supervisory board of Stadtwerke Halle GmbH. The statutes grant the City of Halle certain rights in respect of the annual accounts, in particular the right to conduct an audit, and to pass information directly on to the city's audit authority.

9. By letters of 21 December 2001 and 30 January 2002, Arbeitsgemeinschaft Thermische Restabfall- und Energieverwertungsanlage TREA Leuna ('TREA') complained that the requirements for classification as an in-house transaction were not satisfied and that consequently the city's intention to award the contract for waste disposal services from 1 June 2005 without issuing a formal invitation to tender infringed procurement law. By letter dated 7 February 2002, and in talks on 19 February 2002, the City of Halle reaffirmed its view of the law. By a document of 21 February 2001, TREA applied for a review procedure before the Vergabekammer (Procurement Division) of the Regierungspräsidium (District Administration) Halle, seeking to have the City of Halle ordered to carry out a public tender procedure. The Vergabekammer of the Regierungspräsidium, by order of 27 May 2002, ordered the City of Halle to award the contract for the services — 'disposal of residual waste of the City of Halle from 1 June 2005' — on a competitive basis by means of a transparent procurement procedure in accordance with the national regulations.

10. The City of Halle and RPL both appealed immediately against that decision to the Oberlandesgericht (Higher Regional Court) Naumburg.

IV — The questions referred

11. The Oberlandesgericht Naumburg stayed the appeal and referred the following questions to the Court:

'(1) Does the first sentence of Article 1(1) of [Directive 89/665] require Member States to ensure that the decision of a contracting authority not to award a public contract in a procedure which complies with the directives relating to the award of public contracts may be reviewed effectively and as rapidly as possible?

(2) Does the first sentence of Article 1(1) of [Directive 89/665] require Member States to ensure that decisions of contracting authorities made prior to the issue of a formal invitation to tender, in particular the decision on the preliminary questions of whether a particular procurement process falls within the

personal or material scope of the directives relating to the award of public contracts or exceptionally is outside the scope of procurement law, may be reviewed effectively and as rapidly as possible?

(3) If Question 1 is answered in the affirmative and Question 2 is answered in the negative: Is the obligation of a Member State to ensure that the decision of a contracting authority not to award a public contract in a procedure which complies with the directives relating to the award of public contracts may be reviewed effectively and as rapidly as possible satisfied if the availability of review procedures depends on a specified, formal stage in the procurement procedure having been reached, for example the commencement of oral or written contractual negotiations with a third party?

(4) Where a contracting authority such as a regional or local authority intends to conclude in writing, with an entity which is formally distinct from it ("the contracting partner"), a service contract for pecuniary interest which would fall within [Directive 92/50], and that contract would exceptionally not be a public service contract within the meaning of Article 1(a) of [Directive 92/50] if the contracting partner were to be regarded as part of the public administration or, as the case may be, of the contracting authority's undertaking (a "procurement-exempt self-supply"), does the mere fact that a private undertaking is a shareholder in the contracting partner always preclude the classification of such a contract as a procurement-exempt self-supply?

(5) If Question 4 is answered in the negative: In what circumstances is a contracting partner whose shareholders include a private person (a "semi-public company") to be regarded as part of the public administration or, as the case may be, of the contracting authority's undertaking? In particular:

(a) Does "control" by the contracting authority, for example within the meaning of Articles 1(2) and 13(1) of [Directive 93/38] as amended by the [Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the Adjustments to the Treaties on

which the European Union is founded (OJ 1994 C 241, p. 228)] and by Directive 98/4/EC of the European Parliament and of the Council of 16 February 1998 (OJ 1998 L 101, p. 1), suffice, from the point of view of structure and degree of control, for a semi-public company to be regarded as part of the contracting authority's undertaking?

(b) Does any influence the private co-shareholder in the semi-public company may legally have on the contracting partner's strategic objectives and/or individual decisions relating to the management of its undertaking preclude regarding the semi-public company as part of the contracting authority's undertaking?

(c) Does a comprehensive right of direction, in respect only of decisions on concluding the contract and providing the services concerning the specific procurement procedure, suffice, from the point of view of structure and degree of control, for a semi-public company to be regarded as part of the contracting authority's undertaking?

(d) Does the fact that at least 80% of the undertaking's average turnover in the services sector within the Community during the last three years derives from providing those services for the contracting authority or for undertakings affiliated to or to be regarded as part of the contracting authority, or, where the mixed undertaking has not yet carried on business for three years, that it is to be expected by way of forecast that that 80% rule will be fulfilled, suffice, from the point of view of carrying out the essential part of its activities for the contracting authority, for a semi-public company to be regarded as part of the contracting authority's undertaking?'

V — Judicial protection (Questions 1 to 3)

A — *Admissibility*

12. As regards the questions relating to judicial protection, it must first be determined whether they are admissible, and, if so, to what extent.

13. The Court of Justice is bound in principle to give a preliminary ruling unless it is obvious that the request is in reality designed to induce the Court to give a ruling on a fictitious dispute, or to deliver advisory opinions on general or hypothetical questions, or the interpretation of Community law requested bears no relation to the actual facts of the main action or its purpose, or the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it. [6]

14. In the present proceedings, as the case-file shows, the process of making the prospective award which constitutes the subject-matter of the main action has reached a definable stage: there is now a draft contract. The questions referred are therefore admissible only in so far as they need to be answered in order to resolve the legal dispute as it relates to those specific facts. Although the questions raise important issues relating to judicial protection, procedural considerations make it inappropriate to address such general matters in the present context, as the circumstances to which they relate do not obtain in the specific case before the referring court. Nor has that court explained why it considers that an answer predicated on such facts is necessary for it to be able to decide the case before it.

15. Accordingly, since there is nothing to suggest that such an answer is needed in order to resolve the dispute in the main proceedings, these questions must be regarded as hypothetical and, accordingly, inadmissible. [7]

16. In so far as they seek to resolve general questions of law, therefore, the questions referred are inadmissible — likewise the matter of the compatibility of national law with Community law, raised in the third question. Subject to those reservations, however, the questions concerning judicial protection are admissible in other respects, in relation to the facts of the main action. As the first three questions all go to the same substantive issue — which acts on the part of a contracting authority are reviewable? — it seems advisable to consider and answer them together.

6 — On award procedures, see Case C-421/01 *Traunfellner* [2003] ECR I-11941, paragraph 37, and Case C-448/01 *EVN and Wienstrom* [2003] ECR I-14527, paragraph 76. See also, in particular, Case 244/80 *Foglia* [1981] ECR 3045, paragraph 18; Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 61; Case C-134/95 *USSL No 47 di Biella* [1997] ECR I-195, paragraph 12; and Case C-306/99 *BIAO* [2003] ECR I-1, paragraph 89.

7 — *Traunfellner*, cited in footnote 6, paragraph 38 et seq., and *EVN and Wienstrom*, cited in footnote 6, paragraph 83; see also Case C-314/01 *Siemens* [2004] ECR I-2549, paragraph 36.

B — *Merits*

17. The issue raised by the questions concerning judicial protection against certain decisions by the contracting authority is basically this: from what stage prior to the actual award must the national review proceedings stipulated in Directive 89/665 be available? The task, essentially, is to determine the point at which a prospective procurement operation has crystallised sufficiently for judicial protection to be available.

18. The starting point is the principle that 'decisions' within the meaning of Article 1 (1), likewise 'decisions' as reviewable acts within the meaning of Article 2(1)(b) of Directive 89/665 (that is, those acts on the part of the contracting authority which are subject to challenge), represent a concept which, according to the Court's case-law, should be construed broadly.

19. In that case-law, the Court has held that Article 1(1) of Directive 89/665 'does not lay down any restriction with regard to the nature and content of those decisions'. [8]

8 — Case C-81/98 *Alcatel Austria and Others* [1999] ECR I-7671, paragraph 35; Case C-92/00 *HI* [2002] ECR I-5553, paragraph 49; and Case C-315/01 *GAT* [2003] ECR I-6351, paragraph 52.

20. Moreover, Article 1(3) of Directive 89/665 requires Member States to ensure that the review procedures provided for are available 'at least' to any person having or having had an interest in obtaining a particular public contract and who has been or risks being harmed by an alleged infringement of the Community law on public procurement or national rules transposing that law.

21. The question in the present proceedings is whether the broad concept of 'decisions' encompasses decisions 'upstream' — that is, in legal parlance, decisions taken prior to the commencement of an award procedure. The decisions at issue are thus more than mere deliberative exercises, and less than a decision to commence, or not to commence, an award procedure.

22. The purpose of Directive 89/665 — to ensure that effective review proceedings are available, as expressly stipulated in Article 1(1) — is such that it must cover decisions taken prior to the commencement of an award procedure.

23. In point of its reviewability, a decision not to conduct an award procedure is comparable to, and the counterpart of, a decision to terminate an award procedure.

24. Decisions to terminate an award procedure are among the acts on the part of an awarding authority that are amenable to review. The Court has expressly stated that this applies to the withdrawal of an invitation to tender. 'The full attainment of the objective pursued by Directive 89/665 would be compromised if it were lawful for contracting authorities to withdraw an invitation to tender for a public service contract without being subject to the judicial review procedures designed to ensure that the directives laying down substantive rules concerning public contracts and the principles underlying those directives are genuinely complied with.' [9]

25. By its very nature, of course, a decision not to conduct a tendering procedure within the meaning of the procurement directives (unlike a decision to revoke a procedure which has already been initiated) does not form part of a tendering procedure; however, that in no way precludes the application of Directive 89/665.

26. Indeed, as the Court has held, Directive 89/665, the aim of which is to promote judicial protection, encompasses more than just the review of infringements of the substantive procurement directives. Thus Article 1(1) of Directive 89/665 'applies to all decisions taken by contracting authorities which are subject to the rules of Community law on public procurement', [10] the Court in that judgment deciding not to limit the scope of the provision to the rules laid down in the public procurement directives.

27. Member States are not obliged to make review proceedings available to any person wishing to obtain a public contract. Rather, they may require, in addition, that the person concerned has been, or risks being, harmed by the alleged infringement. [11] In principle, therefore, they may stipulate that a person must have participated in the relevant award procedure before he can demonstrate both an interest in a particular contract and also a risk of sustaining loss as a result of the allegedly illegal award.

9 — *HI*, cited in footnote 8, paragraph 53.

10 — Particularly Case C-57/01 *Makedoniko Metro and Michaniki* [2003] ECR I-1091, paragraph 68. See also *HI*, cited in footnote 8, paragraph 37, and *GAT*, cited in footnote 8, paragraph 52.

11 — Case C-230/02 *Grossmann Air Service* [2004] ECR I-1829, paragraph 25 et seq., and Case C-249/01 *Hackermüller* [2003] ECR I-6319, paragraph 18.

28. However, the Court has already determined that, where an undertaking has not submitted a tender because there were allegedly discriminatory specifications in the documents relating to the invitation to tender, or in the contract documents, which have actually prevented it from being in a position to provide all the services requested, it is entitled to seek review of those specifications directly, even before the procedure for awarding the contract concerned is terminated. [12]

29. Just as an undertaking must be able to institute review proceedings immediately in order to challenge infringements, without awaiting the conclusion of the award procedure, [13] so also must it be able to obtain review of certain decisions relevant to the award without having to wait for an award procedure to be initiated. Typically, in the cases where this kind of issue arises, no award procedure within the meaning of the procurement directives occurs at all — and an undertaking can hardly be required to put in a bid where no award procedure has been initiated.

30. Whether or not any award procedure as provided for in the substantive procurement directives was actually conducted is thus not determinative in regard to the application of the remedies directives and, therefore, the review procedure. This is because the reach of the remedies directives depends, not on whether the substantive procurement directives such as Directive 93/38 were applied in a given situation, but on whether one of those directives should have been (or be) applied — in other words, whether the procedure of which review is sought is covered by one of those directives.

31. It follows that even certain acts performed before an award procedure is instituted are subject to review within the meaning of Directive 89/665. But there are limits.

32. One consideration telling against a blanket rule that all a contracting authority's acts are reviewable is the fact that the individual stages leading up to the instituting of an award procedure not only vary from Member State to Member State, but also depend on the specific project.

33. One particular criterion which the Court has developed in regard to the availability of judicial protection should also be borne in mind. Directive 89/665, it has held, 'is

12 — *Grossmann Air Service*, cited in footnote 11, paragraph 28.

13 — *Grossmann Air Service*, cited in footnote 11, paragraph 29 et seq.

confined to reinforcing existing arrangements at both national and Community levels for ensuring effective application of Community directives on the award of public contracts, in particular at the stage *where infringements can still be rectified*'. [14]

34. Another judgment of the Court confirms that not every act on the part of a contracting authority is reviewable. The case in question concerned national legislation limiting review proceedings to certain decisions on the part of the contracting authority. The test applied by the Court was whether adequate judicial protection was available; the Court concluding that, in the circumstances, this was the case — even though, under the relevant national law, it was only possible to challenge procedural acts, if they decided, directly or indirectly, the substance of the case, made it impossible to continue the procedure or to put up a defence, or caused irreparable harm to legitimate rights or interests. [15]

35. If, then, it is permissible — that is, compatible with Directive 89/665 — for certain acts subsequent to the instituting of an award procedure to be excluded from review, it must a fortiori be permissible for certain acts prior to the instituting of an award procedure to be excluded.

36. Finally, it should be recalled that the aim of the procurement directives is merely to coordinate — to harmonise — the award procedure itself, not to regulate the stages preceding the award.

37. I conclude, therefore, that Directive 89/665 does not confer comprehensive preventive judicial protection.

38. One critical determinant of reviewability is the substantive law governing the particular situation — whether or not the relevant directives confer on a given undertaking a specific claim to have a particular action taken, or desisted from.

39. A claim for a prohibitory order is thus also, in principle, a possibility. Such a claim might perhaps seek to prohibit an entity subject to the procurement directives from effecting a procurement covered by the

14 — *Alcatel Austria and Others*, cited in footnote 8, paragraph 33 (emphasis added); see also Case C-433/93 *Commission* v *Germany* [1995] ECR I-2303, paragraph 23.

15 — Case C-214/00 *Commission* v *Spain* [2003] ECR I-4667, paragraph 77 et seq.

directives without conducting an award procedure required by the directives. That creates a parallel, in the judicial protection system, to an order prohibiting a contracting authority from making an award.

40. Hence the effect on the undertaking seeking review is a possible criterion for determining what acts preceding the institution of an award procedure must be reviewable. This is thus a condition for an undertaking's entitlement to bring proceedings.

41. However, the present proceedings concern solely the conditions that must be satisfied for an act to be capable of being challenged.

42. Moreover, since these are proceedings for a preliminary ruling, a further limitation follows from the procedural rules governing such proceedings before the Court. There can be no question here of providing a general definition of acts subject to challenge, but only of giving the national court a helpful answer in order to enable it to decide the case before it.

43. The object of those proceedings is therefore not to develop general criteria which could serve to identify the acts by contracting authorities which are subject to challenge, but merely to determine criteria by which the acts in the specific case before the national court should be assessed.

44. In this connection it is sufficient to point out that Directive 89/665 no more covers purely internal deliberations than it does an assessment of needs, the preparation of the specifications, or indeed pure market prospection. Nor does it extend to a situation in which a contracting authority deliberates internally on the legal question of whether or not a particular procurement operation falls within the scope of the procurement directives.

45. There is, moreover, no need in these proceedings to consider whether a mere decision to commence negotiations with another undertaking is amenable to review, or whether it is only when such negotiations have commenced that a review will lie. Such questions are hypothetical, since the subject-matter of the main action, and hence of these proceedings for a preliminary ruling, is a situation in which a draft contract already exists.

46. In such circumstances, the contracting authority is in a position in which it is about to conclude a contract. That position corresponds to another commonly occurring

procurement situation, the stage immediately prior to the award of a contract. There, depending on the national law applicable, the actual award either precedes the conclusion of a procurement contract, or itself creates the contract, the award being considered to constitute acceptance of the tender.

47. That in both those latter situations an award procedure will have been conducted, but not in the present situation, must not make any difference, in the light of the need to ensure effective judicial protection.

48. The answer to the first three questions should therefore be that, on a proper construction, Article 1(1) of Directive 89/665 requires Member States, under certain conditions, to ensure that certain decisions of the contracting authorities taken outside an award procedure may none the less be reviewed effectively and as rapidly as possible; such decisions may include a decision on the preliminary issue of whether to effect a particular procurement without conducting an award procedure.

VI — Quasi-in-house procurement (Questions 4 and 5)

49. The second set of questions concerns the conditions attaching to quasi-in-house procurement, as it has been termed. This, as the Austrian Government has correctly stressed, differs from in-house procurement (self-supply), in that it involves awards to an entity separate from the contracting authority, and having legal personality. If the entity responsible for the supply lacks legal personality, no contract could exist. One of the preconditions for a contract within the meaning of the procurement directives would then be missing.

50. What is strictly at issue in the present case is the interpretation of the concept of 'contract' — the existence of which is a precondition for the application of the procurement directives. The starting point must be *Teckal*: the Court held there that certain stages in the procurement process are not covered by the procurement directives.

51. *Teckal* stated that the procurement directives do not apply where 'the local authority exercises over the person con-

cerned *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'. [16]

52. The Court thus established two conditions which must be fulfilled for a procurement operation to fall beyond the reach of the procurement directives, and thereby narrowed the concept of 'contract' by interpreting it teleologically.

53. It must be stressed that the Court expressly stated that non-applicability of the directives in question remains the exception. The general principle that exceptions are to be construed narrowly must therefore apply, and must govern the examination of the two conditions to which I now turn.

54. I would also emphasise that, apart from the *Teckal* exception and certain other exceptions (for example, Article 6 of Directive 92/50), it is generally the case that awards to entities which are themselves contracting authorities (such as certain subsidiaries) are 'contracts' within the meaning of the concept. The application of the procurement directives therefore remains the rule. [17]

55. One should also bear in mind the origin of quasi-in-house operations, and hence of the *Teckal* exception, namely the special treatment of in-house operations and other arrangements which may be assimilated to them.

56. Finally, one should remember the aims of the procurement directives: to open up markets, and to safeguard competition.

57. These are the points of orientation which are relevant for the interpretation of the *Teckal* exception.

58. In general, it is necessary to distinguish between three different quasi-in-house scenarios: awards to wholly owned companies, owned 100% by the contracting authority or entities which may be equated with that

16 — *Teckal*, cited in footnote 2, paragraph 50 (emphasis added).

17 — Case C-94/99 *ARGE* [2000] ECR I-11037, paragraph 40, and *Teckal*, cited in footnote 2, paragraph 50.

authority; awards to joint public companies whose shares are held by a number of contracting authorities; and awards to semi-public companies, in which genuinely private parties hold a stake.

59. The action before the national court concerns a planned award by the City of Halle (a local authority, and hence clearly a contracting authority within the meaning of the procurement directives) to a 'great-grandchild' company. While the City of Halle holds 100% of the shares in the daughter company, and the latter likewise 100% of the shares in the grandchild company, that grandchild holds only 75.1% of the shares in the great-grandchild, the remainder being held by a purely private undertaking.

60. The present proceedings thus concern a 'semi-public' company: a majority of the shares are held (indirectly) by a contracting authority, while a party which is not a contracting authority has a minority stake.

61. For procedural reasons I shall confine the remainder of this Opinion to circumstances such as those in the main action. It remains the task of the national court to apply the law to the facts of the case before it. [18]

18 — See the order of the Court of 14 November 2002 in Case C-310/01 *Comune di Udine and Others* (not published in the ECR).

A — *First criterion: Control similar to that which it exercises over its own departments*

62. The first condition which must be met for the exception to apply (and accordingly for the procurement directives not to apply) concerns the nature of the control exercised by the contracting authority over the body to whom the contract is to be awarded. The Court requires that such control should be 'similar to that which [the authority] exercises over its own departments'.

63. The Court thus proceeds from a criterion taken from public law. However, as the concept of 'control', like that of 'contract' and 'contracting authority', must be understood in functional not formal terms, there is nothing to prevent it being applied to the relationship between a contracting authority and legal persons governed by private law, such as, in the present case, a limited liability company. The use of the term 'departments' derives from the original reason for setting up autonomous bodies, which was to move particular departments out of house.

64. The fact that in the *Teckal* judgment, in the language of the case, Italian, the Court requires only control which is analogous

('analogo'), that is, comparable but not identical, provides further support for the view that the criterion in question may indeed be applied to other sets of circumstances. [19]

65. Hence any appraisal of the legal position of a majority shareholder must be governed in part by the relevant provisions of national law — in the present case, company law on limited liability companies. One must also consider the provisions — normally the company's statutes — which shape the specific relationship in question. Accordingly, it is not enough to make a purely abstract assessment based on the legal form (the type of legal personality, say) selected for the entity over which the control is exercised.

66. National provisions — generally in the form of legislation — are therefore of only limited significance. That is particularly true of rules setting out what rights minority shareholders have, and under what conditions. Essentially, such rules give shareholders certain specific oversight and blocking rights once their holding reaches a particular level — 10%, perhaps, or 25%, or over 50%.

67. However, such rules raise only a presumption as to what rights a minority shareholder has. It is the provisions governing the specific situation which are determinative. The most important case in this connection is a 'dominant party' agreement, whereby a particular shareholder is granted certain rights beyond the minimum required by law irrespective of the size of his shareholding.

68. Since it is the circumstances of the specific case which are determinative, rather than the provisions of national legislation, it follows that the level of the public contracting authority's shareholding (or, conversely, that of the minority shareholder) cannot be the only critical factor.

69. To focus on a set percentage would therefore make it more difficult to achieve a proper solution: it would make it impossible to consider the specific circumstances of any case, and would completely preclude the application of the criterion of control in situations where the relevant shareholding remained below the percentage set.

70. However, since entities in which there is a private minority shareholding may also pass the control test, it follows that the *Teckal* exception must extend not only to wholly owned companies but also to semi-

19 — However, see Advocate General Léger, who at point 66 of his Opinion of 15 June 2000 in *ARGE* (judgment cited in footnote 17), point 66, goes so far as to require that 'the contracting authority which is seeking the provision of various services from the operator must in fact be the very local authority that closely controls it, and not another authority'.

public companies. There is therefore, in principle, no problem created by private businesses being involved.

71. Moreover, Advocate General Léger considered that the *Teckal* exception applied even where the level of the shareholding in question was 50.5%. [20]

72. At all events, the criterion of control developed by the Court entails more than a 'dominant influence' as that phrase is used in company law, or as it is used in the first article of the various procurement directives to classify certain bodies as contracting authorities; likewise it extends beyond the 'dominant influence' found in Article 1(3) read together with Article 13 of Directive 93/38. First, the provisions in question apply only to the specific sectors stated, and have no counterpart in the directive which applies to the present case; secondly, they constitute an exception, and exceptions must normally be construed narrowly.

73. Neither the Community legislature (in the directives) nor the Court (in *Teckal*) have suggested that the provisions of the procurement directives are the relevant criterion.

74. The level of control required cannot therefore be read across from particular provisions of the procurement directives; it exceeds what is required by other exceptions precisely because the situation contemplated is exceptional.

75. In the context of a reference for a preliminary ruling, it is for the national court to interpret the provisions of national law, and then apply these and other provisions to the facts of the case before it. In the present case, therefore, the referring court will need to ascertain what rights the City of Halle — the 'great-grandparent' company — enjoys in respect of its 'great-grandchild' RPL.

76. In applying the control test, the national court must start from the powers of the controlling body. Simply on grounds of legal certainty, issues such as whether, and how, such control is exercised in practice cannot be conclusive, much less any speculation as to how a majority shareholder might use his share (i.e. whether they might go so far as to override the wishes of the minority shareholder). The significance of any duty to act in good faith on the part of the majority shareholder must thus be seen in relative terms, especially as any similar obligations on the part of the minority shareholder should not be overlooked — as the City of Halle has indeed pointed out.

20 — Opinion of Advocate General Léger in *ARGE*, cited in *footnote 19 (judgment cited in footnote 17)*, point 60.

77. As to the object of the control, the Court did not confine its *Teckal* ruling to any specific decisions by the controlled body. Control merely over procurement decisions in general, or even over the specific procurement decision, is not enough.

78. The wording and purpose of the criterion of 'control similar to that which it exercises over its own departments' indicate that a more comprehensive possibility of control is required. Such control should not be confined to strategic market decisions, but should embrace individual management decisions as well. There is no need to go into greater detail in these preliminary ruling proceedings, since that is not necessary in order to resolve the dispute before the national court.

B — *Second criterion: Essential part of the activities carried out with the owner of the shares*

79. The second condition which must be met in order for the *Teckal* exception to apply concerns the activities of the body over which the control is exercised. As the relevant passage of the judgment states, the exception only applies 'if that person carries out *the essential part of its activities* with the controlling local authority or authorities'.

80. That criterion can be understood more broadly in that, first, it may extend not only to those with a direct shareholding but also, as in the present case, to 'great-grandparent' companies with an indirect shareholding and, second, it need not be restricted to regional and local authorities.

81. The *Teckal* criterion thus relates to a certain minimum proportion of the total activities performed by the controlled body. It is therefore necessary to ascertain the extent of all the activities performed and of those performed with the shareholder within the broad sense of that term.

82. In the present context, however, while the term 'shareholder' must not be construed too narrowly, that does not mean that activities for third parties are also covered, where the shareholder would otherwise have had to perform them itself. In practice, this relates to care services, and hence to local authorities, which are under an obligation vis-à-vis certain persons to provide certain services. That general question is not the subject-matter of these proceedings, since the referring court does not need an answer to it in order to be able to resolve the dispute before it.

83. It should be clearly understood that what matters is what activities are actually performed — not what activities the law, or the company's statutes, permit, let alone what activities the entity may be under a duty to perform.

84. The central question is this: What shareholding is required for the *Teckal* threshold to be reached? Various answers have been mooted, from 'above 50%' via 'to a predominant extent' and 'almost exclusive' to 'exclusive'.

85. While some of this thinking is predicated on a positive approach (based on determining the extent of the services provided for the shareholder), the negative approach also has its adherents. The latter involves proceeding from the proportion of services provided for persons other than the shareholder. Such an approach features not only in submissions in these proceedings, but also in the Opinion of Advocate General Léger, which various parties to the present proceedings have cited. His view is that the directive is applicable where an entity 'carries out the essential part of its activity with operators or local authorities *other than* those of which the contracting authority is made up'. [21] However, since it is the positive approach which informs the *Teckal* exception, I shall not pursue the negative approach any further in this Opinion.

21 — Ibid., point 93 (emphasis added).

86. However, a further important issue was articulated in that passage from Advocate General Léger's Opinion, which should also be considered when determining the requisite shareholding.

87. The question is this: Does the *Teckal* exception permit only a quantitive approach, or should qualitative issues be considered as well? The latter might seem to follow from the wording and purpose of the exception, which contains no indication of how the activities are to be assessed. Moreover, the authentic (Italian) version of the corresponding passage in the *Teckal* judgment does not preclude an additional or alternative qualitative approach ('la parte più importante della propria attività').

88. Furthermore, there is no indication in the *Teckal* exception as to how the requisite shareholding should be calculated. It is thus in no way self-evident that turnover should be the sole criterion.

89. Accordingly, it is the task of the national court to determine the 'essential part' of the activities on the basis of quantitative and qualitative parameters. The market situation of the controlled body may also be relevant (that is, in particular, its competitive situation vis-à-vis possible rivals).

90. As several parties have cited Advocate General Léger's Opinion in regard to the second *Teckal* condition, it should be borne in mind that an Opinion is authentic in the language chosen as the original language by the advocate general.

91. When considered on that basis, the Opinion in question presents the following features: it refers to the services being provided 'more or less exclusively' to the authority — 'quasi-exclusivité' is the phrase in the French original, [22] and also reflects the way the *Teckal* exception is expressed in Italian, the language of that case, using the words 'en grande partie' [23] when referring to the 'essential part', and later 'la plus grande partie de leur activité' [24] — 'the essential part of their activities'.

92. Several parties to these proceedings have suggested that the 'essential part' criterion might be defined more precisely by interpreting it in line with a provision governing awards to undertakings affiliated with the contracting authority, namely the 80% criterion in Article 13 of Directive 93/38. That criterion, it is contended, is 'objective' or 'appropriate'.

22 — Ibid., point 74.
23 — Ibid., point 81.
24 — Ibid., point 83.

93. It must be said that a different fixed percentage might also be objective or appropriate. However, the very rigidity of a fixed percentage may represent an obstacle to an appropriate solution. Moreover, it does not permit qualitative factors to be taken into account.

94. The principal argument against taking over the 80% criterion is that it is a derogation in a directive which itself applies only to certain sectors. The evaluation on which it is predicated was intended by the Community legislature to be confined to that specific directive. Even if the underlying thinking may in practice also be applied beyond the sectors in question, the fact remains that no such provision was enacted in the directive in point in the present proceedings, and that is conclusive.

95. There is a further argument against adducing Article 13 of Directive 93/38: paragraph 2 of that article obliges the contracting entities to notify certain information to the Commission, at its request. That procedural requirement thus balances the exception laid down in Article 13. In the case of the *Teckal* exception, however, the Court chose a different route, confining itself to establishing the two substantive preconditions set out in that judgment. However, precisely because there is no comparable procedural requirement, those preconditions must be construed strictly.

VII — Conclusion

96. In the light of the foregoing, I propose that the Court answer the questions referred as follows:

(1) Article 1(1) of Directive 89/665 must be interpreted as requiring Member States to ensure that certain decisions of contracting authorities taken outside an award procedure but connected with a procurement can be reviewed effectively and as rapidly as possible; such decisions may include a decision on the preliminary issue of whether to effect a particular procurement without conducting an award procedure.

(2) Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts must be interpreted as meaning that the fact that a private undertaking has a shareholding in the contracting authority's contractual partner in which the contracting authority has a direct or indirect holding does not in itself exclude the non-application of that directive.

(3) For a contractual partner with a privately owned shareholding — a 'semi-public company' — to be regarded as part of the public administration or as part of the contracting authority's undertaking, what matters is the specific form taken by the relationship, and the size of the shareholding is not in itself decisive.

It does not suffice that:

— the semi-public company is controlled by the contracting authority within the meaning of Articles 1(2) and 13(1) of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors;

— there is a comprehensive right to give instructions with respect solely to procurement decisions in general or procurement decisions concerning the specific case.

(4) For a semi-public company to be regarded as part of the contracting authority's undertaking from the point of view of carrying out 'the essential part of its activities' for the contracting authority, unlike in Article 13 of Directive 93/38 the starting point is not whether at least 80% of the average turnover of that undertaking with respect to services arising within the Community for the preceding three years derives from the provision of such services to the contracting authority or to undertakings affiliated to or to be regarded as part of that authority or, where the semi-public undertaking has not yet carried on business for three years, it is to be expected by way of forecast that that 80% rule will be satisfied.

To decide whether a company should be so regarded, the national court must instead start from the actual activities and take account in particular of both quantitative and qualitative factors.