

Case C-719/20**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

30 December 2020

Referring court:

Consiglio di Stato (Council of State, Italy)

Date of the decision to refer:

18 November 2020

Appellant:

Comune di Lerici

Respondents:

Provincia di La Spezia, IREN SpA, ACAM Ambiente SpA

Subject of the action in the main proceedings

Appeal against judgment No 847 of the Tribunale amministrativo regionale Liguria (Regional Administrative Court, Liguria, Italy) of 6 November 2019, which dismissed the action brought by the Comune di Lerici aimed at setting aside the decision of the Consiglio provinciale di La Spezia (La Spezia Provincial Council) in which the company ACAM Ambiente SpA was selected as operator of the municipal waste service for the municipality of Lerici on the basis of an in-house award.

Subject matter and legal basis of the reference

In the light of Article 267 TFEU, the referring court seeks clarification as to the compatibility with EU law of the rules on awarding public contracts to legal persons, particularly with regard to the concept of ‘similar control’.

Question referred

Does Article 12 of Directive 2014/24/EU of 26 February 2014 preclude national legislation which imposes a concentration of companies providing local public services of economic interest, as a result of which the economic operator succeeding the initial concession holder following transparent corporate transactions, including mergers and acquisitions, continues to operate the services until the agreed date, if:

- (a) the initial concession holder is a company awarded the contract in-house on the basis of similar control where several other public authorities are shareholders in that company;
- (b) the new economic operator has been selected by means of a public call for tenders;
- (c) as a result of the concentration, the requirements for similar control where several other public authorities are shareholders in that company no longer apply in relation to some of the local authorities which originally awarded the service in question.

Provisions of EU law relied on

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; in particular Article 12 ('Public contracts between entities within the public sector'), which lays down the requirements for the in-house award – that is to say, a direct award without competition.

Case-law of the Court of Justice relied on

Judgment of the Court of 18 November 1999, *Teckal*, C-107/98 (essential activity and similar control requirements).

Judgment of the Court of 13 November 2008, *Coditel Brabant SA*, C-324/07 (similar control where several other public authorities are shareholders).

Judgment of the Court of 17 July 2008, *Commission v Italy*, C-371/05 ('decisive influence').

Judgment of the Court of 10 September 2009, *Sea Srl v Comune di Ponte Nossa*, C-573/07 (in order to maintain similar control, the structure of the share capital of the company awarded the contract must remain the same during the relevant period).

Judgment of the Court of 11 January 2005, *Stadt Halle*, C-26/03 (in principle, similar control is precluded where there are both private and public shareholders).

Provisions of national law cited

Decreto-legge 13 agosto 2011, n. 138 (Decree-Law No 138 of 13 August 2011), published in the *Gazzetta ufficiale della Repubblica italiana* No 188 of 13 August 2011 – General Series, and in particular Article 3-bis(2-bis): ‘Any economic operator who universally or partially succeeds the initial concession holder following transparent corporate transactions, including mergers and acquisitions, without prejudice to fulfilment of the original qualitative criteria, shall continue to operate the services until the agreed date.’

Decreto legislativo 18 agosto 2000, n. 267, ‘Testo unico delle leggi sull’ordinamento degli enti locali’ (Legislative Decree No 267 of 18 August 2000, ‘Consolidated law on local authorities’), published in the *Gazzetta ufficiale della Repubblica italiana* No 227 of 28 September 2000 – Ordinary Supplement No 162, and in particular Article 113.

Decreto legislativo 3 aprile 2006, n. 152, ‘Norme in materia ambientale’ (Legislative Decree No 152 of 3 April 2006 on environmental standards), published in the *Gazzetta ufficiale della Repubblica italiana* No 88 of 14 April 2006 – Ordinary Supplement No 96, and in particular Article 200.

Decreto Legislativo 18 aprile 2016, n. 50, ‘Attuazione delle direttive 2014/23/UE, 2014/24/UE e 2014/25/UE sull’aggiudicazione dei contratti di concessione, sugli appalti pubblici e sulle procedure d’appalto degli enti erogatori nei settori dell’acqua, dell’energia, dei trasporti e dei servizi postali, nonché per il riordino della disciplina vigente in materia di contratti pubblici relativi a lavori, servizi e forniture’ (Legislative Decree No 50 of 18 April 2016 implementing Directives 2014/23/EU, 2014/24/EU and 2014/25/EU on the award of concession contracts, on public procurement and on procurement procedures of entities operating in the water, energy, transport and postal services sectors, and restructuring the provisions applicable to public works contracts, public service contracts and public supply contracts), published in the *Gazzetta ufficiale della Repubblica italiana* No 91 of 19 April [2016] – General Series – Ordinary Supplement No 10), and in particular Article 5.

Decreto legislativo 19 agosto 2016, n. 175, ‘Testo unico in materia di società a partecipazione pubblica’ (Legislative Decree No 175 of 19 August 2016, ‘Consolidated law on publicly owned companies’), published in the *Gazzetta ufficiale della Repubblica italiana* No 210 of 8 September 2016 – General Series, and in particular Article 2(1)(c) and (d).

Legge 23 dicembre 2014, n. 190, ‘Disposizioni per la formazione del bilancio annuale e pluriennale dello Stato (legge di stabilità 2015)’ (Law No 190 of 23 December 2014, ‘Provisions for the preparation of the annual and multi-annual State budget (Stability Law 2015)’), published in the *Gazzetta ufficiale della Repubblica italiana* No 300 of 29 December 2014 – General Series – Ordinary Supplement No 99, and in particular Article 1(611) and (612).

Succinct presentation of the facts and the main proceedings

- 1 ACAM, a public limited company under full public ownership and whose share capital was distributed among several local authorities in the province of La Spezia, operated public services for those local authorities through its subsidiaries.
- 2 Specifically, ACAM managed the integrated waste cycle in the municipality of Lerici through its subsidiary ACAM Ambiente SpA, on the basis of an in-house award (pursuant to the decision of 15 June 2005), due to expire in 2028.
- 3 Because of a crisis situation, ACAM was obliged to enter into a debt restructuring agreement with its creditors, as permitted under Italian bankruptcy law. Pursuant to that agreement, with a view to conducting a concentration, it issued a public call for tenders from other companies under public ownership operating public services in the Italian market. The successful tenderer was IREN, a state-controlled company listed on the stock market.
- 4 In such cases, Article 3-*bis*(2-*bis*) of Decree-Law No 138 of 13 August 2011 provides for continuity of management between the original company awarded the contract and its successor.
- 5 Under a special investment agreement signed on 29 December 2017, the local authority shareholders sold their ACAM shares to IREN and acquired, by subscribing for a reserved capital increase, an equivalent percentage of IREN shares. The ACAM shares thus became IREN shares and IREN, through ACAM's subsidiaries – which then became IREN subsidiaries – continued to operate the services originally awarded to them.
- 6 The Comune di Lerici, opposed to the concentration, signed the investment agreement solely with regard to the sale of its ACAM shares to IREN, and subsequently sold them on 11 April 2018. Since it was no longer a shareholder of IREN, which was awarded the service, it thus concluded that the conditions for the in-house award no longer existed.
- 7 In parallel, the Provincia di La Spezia, by its decision of 6 August 2018, selected ACAM Ambiente SpA as operator of the integrated waste service in the municipality of Lerici until 31 December 2028, on the basis of an in-house award.
- 8 The Comune di Lerici challenged that decision, which it considered unlawful, before the TAR Liguria (Regional Administrative Court, Liguria).
- 9 By its judgment of 6 November 2019, the TAR Liguria (Regional Administrative Court, Liguria) dismissed the action brought by the Comune di Lerici, finding that the in-house award of the service in question was lawful both when it was made, and after the local authority ceased to be a shareholder of the company subsequently awarded the contract.

- 10 The Comune di Lerici brought an appeal against that judgment before the referring court. It raised various complaints, the first of which concerned the infringement of Article 12 of Directive 2014/24/EU and Article 4 of Legislative Decree No 175 of 19 August 2016.

Principal arguments of the parties to the main proceedings

- 11 The Comune di Lerici claims that the decision of the Provincia di La Spezia is unlawful because it awarded the waste management service directly, without any tendering procedure, since the conditions for the original direct in-house award of the service to ACAM Ambiente SpA (originally a subsidiary of ACAM) no longer existed.
- 12 The Comune di Lerici, having sold its ACAM shares to IREN, disposed of the shareholding it acquired in IREN, and therefore is no longer a shareholder of IREN. In that respect, any link between the local authority and that company – and therefore any possible control – has disappeared, such that the prerequisites for the in-house award have also ceased to exist, particularly as regards similar control.
- 13 The respondents submit that the decision of the Provincia di La Spezia is lawful, pointing out that IREN was selected as the ‘economic operator’ for the concentration following a public call for tenders. They argue that the final outcome of the transaction (the award of the service) had already been determined by the result of the call for tenders, in a manner entirely consistent with the principles of EU law, and not from the award made by the Provincia di La Spezia. Accordingly, no unlawful direct award has taken place.
- 14 The fact that the call for tenders for selecting the economic operator for the concentration was not intended to award the service in question, or indeed any service, is immaterial, since that was the indirect intention.

Succinct presentation of the reasons for the request for a preliminary ruling

- 15 The referring court points out that under Italian law, the integrated municipal waste management service, pursuant to Article 200 of Legislative Decree No 152 of 3 April 2006, is currently operated by the regional authorities, which identify suitable territorial areas. In the Liguria region, where the events in question took place, the territorial areas coincide with the Provinces, which operate the service for the municipalities of which they are composed. As contracting authorities themselves, they must always issue a public call for tenders or make an in-house award where this is permitted.
- 16 The referring court notes that, under national law, local authorities (such as municipalities) may award the waste management service by setting up a limited company under public ownership for that purpose.

- 17 Moreover, in 2014 the national legislature, in the matter of corporate shareholdings held by public bodies, ruled that local authorities should seek to reduce the number of companies and corporate shareholdings directly or indirectly owned in order to limit public spending. One of the criteria specifically provided for is the concentration of companies providing local public services of economic interest.
- 18 The referring court observes that, in the case at issue, the conditions for joint similar control had already ceased to exist at the time of the concentration, because the shareholding acquired in IREN was negligible and incapable of influencing that company's decisions. Conversely, IREN is a public limited company listed on the Italian stock exchange. Therefore, its shareholders may be private individuals who decide to buy its shares without being subject to any particular formality.
- 19 The referring court recalls that the national legislation transposed Directive 2014/24/EU, and in particular Article 12 thereof, by defining similar control and joint similar control in line with the provisions of that article.
- 20 The referring court also cites various judgments of the Court of Justice in the matter of similar control and fulfilment of the necessary conditions, whereas in its own case-law there is no precedent for cases similar to the one at issue.
- 21 For those reasons, the referring court concurs with the respondents' argument.
- 22 The referring court identifies the promotion of competition as a fundamental objective of the EU law in question. In the award of public services, this is achieved when several operators compete – or are able to compete – regardless of the legal characterisation of the means by which it happens.
- 23 According to the referring court, it is irrelevant whether a given service (in this case, the one relating to the Comune di Lerici) is awarded by means of a call for tenders covering that particular service – considered in isolation or together with the services for the other municipalities concerned – or whether it is awarded by means of a call for tenders aimed at transferring the shares in the company providing those services, because competition is guaranteed in either case.
- 24 The referring court notes, *inter alia*, the importance for the corresponding European market of the economic sector of the provision of public services relating to integrated waste management. In the light of the foregoing, it finds it necessary – in the interests of clarity and legal certainty – to refer the matter to the Court of Justice so as to ascertain whether the national rules on in-house awards are compatible with EU law. The question is material for the decision: if the argument put forward by the Comune di Lerici is correct, the relevant ground of appeal should be allowed and the contested decision should be set aside; further, the Provincia di La Spezia would have to make a new award by lawful means, via a public call for tenders or in-house award, to a party who meets the criteria.

Taking the opposite view, the ground of appeal should be dismissed, since the award would have been made lawfully.

WORKING DOCUMENT