

EU CC PUBLIC PROCUREMENT AUDIT 2018

GUIDELINE FOR AUDITORS

APPENDIX X(b)

Case law of the Court of Justice of the European Union concerning public procurement (1982-2017) – SUMMARIES

Introduction

The Court of Justice has an important role in the European Union. According to the Treaty, it “*shall ensure that in the interpretation and application of this Treaty the law is observed*” (Article 19 TEU). The relevant judgments collected in this Appendix are thus an official interpretation of the EU procurement directive.

The analysis of the case law of the Court of Justice has been established - as far as possible - from the official summaries of the judgments published in the European Court’s Reports. Some relevant paragraphs of judgments can also be found in the text. The Summaries and Judgments are available on the website of the Court of Justice (<http://curia.europa.eu/en/content/juris/index.htm>) or on the portal “Eur-Lex” to European Union law (<http://eur-lex.europa.eu/en/index.htm>).

1. Judgment of 10 February 1982, case 76/81, Transporoute

- **Criteria for qualitative selection** - Proof of tenderer's good standing and qualifications- Requirement of an establishment permit not permissible [Directive 2004/18/EC, article 45 *et seq.*]

The EU procurement directive must be interpreted as precluding a Member State from requiring a tenderer in another Member State to furnish proof by any means, (for exemple by an establishment permit) other than those prescribed by that directive, that he satisfies the criteria laid down in those provisions and relating to his good standing and qualification.

- **Principle of non-discriminatory treatment** – Common market fundamental freedoms [Directive 2004/18/EC, article 2]

The aforementioned interpretation of the directive is also in conformity with the scheme of the treaty provisions concerning the provision of services, the purpose of those provisions being precisely to abolish restrictions on the freedom to provide services by persons who are not established in the State in which the service is to be provided.

- **Principle of non-discriminatory treatment** [Directive 2004/18/EC, article 2]

The directive's rules regarding participation and advertising are intended to protect tenderers against arbitrariness on the part of the authority awarding contracts.

- **Award of contracts** - Abnormally low tender - Obligations of the authority awarding the contract [Directive 2004/18/EC, article 55]

When in the opinion of the authority awarding a contract a tenderer's offer is obviously abnormally low, the EU procurement directive requires the authority to seek from the tenderer, before coming to a decision as to the award of the contract, an explanation of his prices or to inform the tenderer which of his tenders appear to be abnormal, and to allow him a reasonable time within which to submit further details.

2. Judgment of 28 March 1985, case 274/83, Commission/Italy

- **Contract award criteria** - The most economically advantageous tender [Directive 2004/18/EC, article 54]

The award of a contract on the basis of the criterion of the most economically advantageous tender presupposes that the authority making the decision is able to exercise its discretion in taking a decision on the basis of qualitative and quantitative criteria that vary according to the contract in question and is not restricted solely to the quantitative criterion of the average price stated in the tenders.

3. Judgment of 10 March 1987, case 199/85, Commission/Italy

- **Contract award procedures** - Award by private contract - Derogations from the common rules - Strict interpretation - Existence of exceptional circumstances – Burden of proof [Directive 2004/18/EC, article 31]

The derogations from the common rules must be interpreted strictly and the burden of proving the actual existence of exceptional circumstances justifying a derogation and in particular the award by private contract, lies on the person seeking to rely on those circumstances.

4. Judgment of 09 July 1987, joined cases 27-29/86, CEI and Bellini

- **Criteria for qualitative selection** - Economic and financial standing of tenderer -References required - Member States' discretion - Fixing of maximum value of the works which may be carried out at one time – Permissible [Directive 2004/18/EC, article 47]

The references enabling a contractor's financial and economic standing to be determined are not exhaustively enumerated by the EU procurement legislation. A statement of the total value of

the works awarded to a contractor may be required from tenderers as a reference and no provision precludes a Member State from fixing the value of the works which may be carried out at one time.

- **Criteria for qualitative selection** - Economic and financial standing of tenderer -Level required - Recognition in a Member State - Probative value in regard to awarding authority in another Member State – Limits [Directive 2004/18/EC, article 47]

The EU procurement directive must be interpreted as not precluding an awarding authority from requiring a contractor recognized in another Member State to furnish proof that his undertaking has the financial and economic standing and technical capacity required by national law even when the contractor is recognized in the Member State in which he is established in a class equivalent to that required by the national law by virtue of the value of the contract to be awarded unless the classification of undertakings in both member states concerned is based on equivalent criteria in regard to the capacities required.

5. Judgment of 20 September 1988, case 31/87, Beentjes

- **Contracting authorities** - Contracts awarded by a body which falls within the notion of the State although it is not formally part of the State administration – Included [Directive 2004/18/EC, article 1(9)]

For the purposes of the EU procurement directive, the term "the State" must be interpreted in functional terms. A body whose composition and functions are laid down by national legislation and which depends on the authorities for the appointment of its members, the observance of the obligations arising out of its measures and the financing of the public works contracts which it is its task to award must be regarded as falling within the notion of the State. The directive thus applies to public procurement contracts awarded by that body.

- **Criteria for qualitative selection** [Directive 2004/18/EC, article 44 *et seq.*]

The authorities awarding contracts can check the suitability of the contractors only on the basis of criteria relating to their economic and financial standing and their technical knowledge and ability.

- **Criteria for qualitative selection** - Technical ability and knowledge of tenderers - Criteria for checking - Publicity requirements [Directive 2004/18/EC, article 48]

The criterion of specific experience for the work to be carried out is a legitimate criterion of technical ability and knowledge for the purpose of ascertaining the suitability of contractors. Where such a criterion is laid down by a provision of national legislation to which the contract notice refers, it is not subject to the specific requirements laid down in the directive concerning publication in the contract notice or the contract documents.

- **Contract award criteria** - Most economically advantageous tender - Publicity requirements [Directive 2004/18/EC, article 54]

The criterion of "the most acceptable tender", as laid down by a provision of national legislation, may be compatible with the directive if it reflects the discretion which the authorities awarding contracts have in order to determine the most economically advantageous tender on the basis of objective criteria and thus does not involve an element of arbitrary choice.

Where the authorities awarding contracts do not take the lowest price as the sole criterion for the award of a contract but have regard to various criteria with a view to awarding the contract to the most economically advantageous tender, they are required to state those criteria in the contract notice or the contract documents. A general reference to a provision of national legislation cannot satisfy the publicity requirement.

- **Conditions for performance of contracts** - Condition concerning employment of long-term unemployed persons - Principle of non-discriminatory treatment – Publicity requirements. [Directive 2004/18/EC, article 26]

The condition relating to the employment of long-term unemployed persons is compatible with the directive if it has no direct or indirect discriminatory effect on tenderers from other Member States of the Community. An additional specific condition of this kind must be mentioned in the contract notice.

6. Judgment of 22 September 1988, case 45/87, Commission/Ireland

- **Technical specifications** - Free movement of goods – Invitation to tender – Technical specification requiring the materials used to comply with a national standard – Not permissible [Directive 2004/18/EC, article 23]

Member States may not allow a public body for whose acts it is responsible to include in the contract specification for tender for a public works contract a clause stipulating that the materials used must be certified as complying with a national technical standard. This may cause economic operators utilizing materials equivalent to those certified as complying with the relevant national standards to refrain from tendering.

7. Judgment of 22 June 1989, case 103/88, Fratelli Costanzo

- **Award of contracts** - Abnormally low tenders - Automatic disqualification - Not permissible - Obligation to conduct an examination procedure - Tenders subject to examination [Directive 2004/18/EC, article 55].

The EU procurement directive prohibits the Member States from introducing provisions which require the automatic exclusion from procedures for the award of public works contracts of certain tenders determined according to a mathematical criterion, instead of obliging the awarding authority to apply the examination procedure laid down in the directive, giving the tenderer an opportunity to furnish explanations. Member States may require that tenders be

examined when those tenders appear to be abnormally low, and not only when they are obviously abnormally low.

8. Judgment of 5 December 1989, case 3/88, Commission/Italy

- **Principle of non-discriminatory treatment** - Equal treatment - Discrimination by reason of nationality - Prohibition - Covert discrimination – Included [Directive 2004/18/EC, article 2]

The principle of equal treatment, prohibits not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result.

- **Activities connected with the exercise of official authority** - Contracts declared to be secret when their performance must be accompanied by special security measures - Derogations to the common market fundamental freedoms – Technical activities in the field of data processing carried out for the public authorities – Excluded [Directive 2004/18/EC, article 14]

The exception to freedom of establishment and freedom to provide services must be restricted to those of the activities which in themselves involve a direct and specific connection with the exercise of official authority. That is not the case in respect of activities concerning the design, programming and operation of data-processing systems for the public authorities, since they are of a technical nature and thus unrelated to the exercise of official authority. It must be borne in mind that the confidential nature of the data processed by the systems could be protected by a duty of secrecy, without there being any need to restrict freedom of establishment or freedom to provide services.

- **Contract award procedures** - Application of negotiated procedure without justification - National legislation giving companies controlled by the national public sector exclusive rights to supply goods in the field of data processing - Not permissible [Directive 2004/18/EC, article 31]

A Member State which provides that only companies in which all or a majority of the shares are either directly or indirectly in public or State ownership may conclude agreements for the development of data-processing systems for the public authorities thereby fails to fulfil its obligations.

9. Judgment of 20 March 1990, case C-21/88, Du Pont de Nemours

- **Principle of non-discriminatory treatment** - Principle of freedom of movement of goods - Reservation of 30 % of public supply contracts to undertakings located in a particular region of the national territory - Not permissible - Measure benefiting only part of domestic production - No effect [Directive 2004/18/EC, article 2]

The principle of freedom of movement of goods precludes national rules which reserve to undertakings established in particular regions of the national territory a proportion of public supply contracts. Although the restrictive effects of a preferential system of that kind are borne in the same measure both by products manufactured by undertakings from the Member State in question which are not situated in the relevant region and by products manufactured by undertakings established in the other Member States, the fact remains that all the products benefiting by the preferential system are domestic products. Moreover, the fact that the restrictive effect exercised by a State measure on imports does not benefit all domestic products but only some, cannot exempt the measure in question from the prohibition set out by the principle of freedom of movement of goods.

10. Judgment of 18 March 1992, case C-24/91, Commission/Spain

- **Contract award procedures** - Mandatory publication – Infringement - Application of negotiated procedure without justification - reasons of extreme urgency [Directive 2004/18/EC, article 31 and 35]

The EU procurement directive permits, in exceptional circumstances, derogations from the common rules, in particular those on advertising. That provision does not, however, apply if sufficient time is available to the authorities awarding contracts to organize an accelerated award procedure such as that provided for in the directive.

11. Judgment of 3 June 1992, case C-360/89, Commission/Italy

- **Principle of non-discriminatory treatment** - Principle of equal treatment – Covert discrimination - Freedom to provide services - Award of public works contracts [Directive 2004/18/EC, article 2]

A Member State which reserves any public works to companies which have their registered offices in the region where the works are to be carried out and establishes a preference for temporary associations which include undertakings carrying on their main activity in that region is in breach of its obligations under the EC Treaty and the EU procurement directive.

- **Criteria for qualitative selection** - National rules favouring local undertakings –Prohibited [Directive 2004/18/EC, article 44 *et seq.*]

When a preference is to be accorded by a national legislation to temporary associations or consortia which include undertakings carrying on their main activity in the region where the works are to be carried out, such preference constitutes a criterion of selection which is not mentioned in the directive and, in particular, does not relate to any of the economic and technical standards provided for. Consequently, this national provision infringes the EU procurement Directive.

12. Judgment of 22 June 1993, case C-243/89, Commission/Denmark

- **Principle of non-discriminatory treatment** - Common market fundamental freedoms- Condition requiring the use to the greatest possible extent of national products and labour [Directive 2004/18/EC, article 2]

By letting tenders be invited, in a procedure for the award of public works contracts, on the basis of a condition requiring the use to the greatest possible extent of national materials, consumer goods, labour and equipment, a Member State fails to fulfil its obligations under the Treaty and the EU procurement directive.

- **Principle of equal treatment** [Directive 2004/18/EC, article 2]

The principle of equal treatment of tenderers lies at the very heart of the EU procurement directive whose purpose is to ensure in particular the development of effective competition in the field of public contracts

- **Contract award procedures** - Principle of equal treatment - Negotiations with a tenderer on the basis of a tender not complying with the tender conditions - Not permissible [Directive 2004/18/EC, article 2]

Observance of the principle of equal treatment of tenderers requires that all the tenders comply with the tender conditions so as to ensure an objective comparison of the tenders submitted by the various tenderers. By letting negotiations be conducted with the selected tenderer on the basis of a tender not complying with the tender conditions, a Member State fails to fulfil its obligations under the Treaty and the EU procurement directive.

13. Judgment of 2 August 1993, case C-107/92, Commission/Italy

- **Contract award procedures** - Mandatory publication – Infringement - Application of negotiated procedure without justification - (no) reasons of extreme urgency [Directive 2004/18/EC, article 31, article 35]

The EU procurement directive allows, in exceptional circumstances, derogations from the general rules, in particular those concerning advertising. However, such derogations are not available if the authorities awarding contracts have sufficient time to arrange for an accelerated tendering procedure which is provided in the directive.

- **Contract award procedures** - Mandatory publication – Exemption – Conditions [Directive 2004/18/EC, articles 31 and 35]

The exemption from the obligation to publish a notice of a call for tenders, is available only if three conditions are fulfilled concurrently. It requires the existence of an unforeseeable event, extreme urgency rendering the observance of time-limits laid down by other procedures impossible and, finally, a casual link between the unforeseeable event and the extreme urgency resulting therefrom.

14. Judgment of 14 April 1994, case C-389/92, Ballast Nedam Groep I

- **Criteria for qualitative selection** - Registration of contractors - Suitability to pursue the professional activity - Relevant entity - Application by a holding company not itself carrying out the works but availing itself, for the purpose of proving its standing and competence, of references relating to its subsidiaries - Whether permissible – Conditions [Directive 2004/18/EC, article 44 *et seq.*]

The EU procurement directive must be interpreted as meaning that they permit, for the purposes of the assessment of the criteria to be satisfied by a contractor when an application for registration by the dominant legal person of a group is being examined, account to be taken of companies belonging to that group, provided that the legal person in question establishes that it actually has available the resources of those companies which are necessary for carrying out the works.

15. Judgment of 19 April 1994, case C-331/92, Gestión Hotelera Internacional

- **Scope of the EU procurement directive** - Mixed contract relating both to the performance of works and to the assignment of property - Performance of the works incidental to the assignment of property - Exclusion [Directive 2004/18/EC, article 1 (2) by analogy]

A mixed contract relating both to the performance of works and to the assignment of property should not be considered as works if the performance of the works is merely incidental to the assignment of property.

16. Judgment of 26 April 1994, case C-272/91, Commission/Italy

- **Contract award procedures** - Common market fundamental freedoms - Invitation to tender restricting the right to tender for the concession of the lottery computerization system to bodies controlled by the public sector - Contract not relating to activities connected with the exercise of official authority [Directive 2004/18/EC, article 2]

The provisions of the Treaty on the common market fundamental freedoms and the EU procurement directive are infringed where a Member State restricts participation in a contract for the concession of the lottery computerization system to bodies the majority of whose capital is held by the public sector. The contract, which relates to the premises, supplies, installations, maintenance, operation and transmission of data and everything else that is necessary for the conduct of the lottery, does not involve any transfer of responsibility to the concessionaire for the various activities inherent in the lottery. The derogation to the fundamental freedoms regarding activities connected with the exercise of official authority does therefore not apply.

17. Judgment of 3 May 1994, case C-328/92, Commission/Spain

- **Contract award procedures** - Pharmaceutical products and specialities – Application of negotiated procedure without justification - (no) reasons of extreme urgency - Derogations from common rules - Strict interpretation - Existence of exceptional circumstances - Burden of proof [Directive 2004/18/EC, article 31]

The derogations from the common rules must be interpreted strictly and the burden of proving the actual existence of exceptional circumstances justifying a derogation lies on the person seeking to rely on those circumstances. They cannot in any way justify general and indiscriminate recourse to the single-tender procedure for all supplies of pharmaceutical products and specialities to social security institutions. If a derogation is to apply, it is not sufficient for the pharmaceutical products and specialities to be protected by exclusive rights; they must also be capable of being manufactured or delivered only by a particular supplier, a requirement which is satisfied only with respect to those products and specialities for which there is no competition in the market. With regard to the derogation on the grounds of urgency although, having regard to the freedom of doctors to prescribe pharmaceutical products, an urgent need for a particular pharmaceutical speciality may well arise in a hospital pharmacy, that cannot justify systematic recourse to the single-tender procedure for all supplies of pharmaceutical products and specialities to hospitals. In any event, even if the requirement of urgency were considered to have been satisfied in a particular case, the derogation provided for by that provision may be relied on only if all the conditions it lays down are satisfied cumulatively.

18. Judgment of 24 January 1995, case C-359/93, Commission /Netherlands

- **Contract award procedures** – Tender notices - Information which must be given in tender notices - Information concerning the opening of tenders - Technical specifications - Use of technical specifications defined by reference to a trade mark – Condition [Directive 2004/18/EC, article 23]

A Member State fails to fulfil its obligations under the EU procurement directive where it: i. fails to indicate in a tender notice the persons authorized to be present at the opening of tenders or the date, time and place of opening, when that information is compulsorily and unconditionally required by the directive in order to enable potential suppliers to discover the identity of their competitors and to check whether they meet the criteria laid down for qualitative selection; ii. and fails in such notice to add the words "or equivalent" after a technical specification defined by reference to a particular trade mark, when the directive requires them to be added and when failure to do so may impede the flow of imports in intra-Community trade, contrary to the Treaty.

19. Judgment of 28 March 1996, case C-318/94, Commission/Germany

- **Contract award procedures** - Application of negotiated procedure without justification - (no) reasons of extreme urgency - Refusal by a body within a Member State, during the procedure provided for under national legislation, to give its approval for a public works

project - Refusal not an unforeseeable event within the meaning of the directive [Directive 2004/18/EC, article 31]

The fact that a body in a Member State which must, in the procedure for approval of public works projects provided for under national legislation, approve a project may, before expiry of the period laid down for that purpose, raise objections for reasons which it is entitled to put forward cannot constitute an unforeseeable event. A Member State whose competent authorities, after deciding not to award a public works contract by open procedure by reason of the delay resulting from the refusal by a body to approve the work plans originally envisaged, award a contract for partial work by negotiated procedure without prior publication of a tender notice, will therefore be in breach of its obligations under the directive.

20. Judgment of 25 April 1996, case C-87/94, Commission/Belgium

- **Contract award criteria – Variants - Principle of equal treatment - Principle of transparency -** Taking into account, after the opening of tenders of amendments made to one of them - Contract awarded on the basis of figures not corresponding to the prescriptive requirements of the contract documents - Taking into account variants of the award criteria not mentioned either in the contract documents or in of the tender notice - Breach [Directive 2004/18/EC, article 2 and 54]

It follows from the EU procurement directive that the contracting entity's procedure for comparing tenders has to comply at every stage with both the principle of the equal treatment of tenderers and the principle of transparency. A Member State which, in the procedure for the award of a public contract, i. takes into account tender amendments submitted by a tenderer after the opening of tenders, ii. awards the contract to the same tenderer on the basis of figures which do not correspond to the prescriptive requirements of the contract documents, iii. takes into account, when comparing tenders for certain lots, the cost-saving features suggested by the same tenderer, without having referred to them in the contract documents or in the tender notice, fails to fulfil that obligation.

21. Judgment of 18 December 1997, case C-5/97, Ballast Nedam Groep II

- **Criteria for qualitative selection -** Suitability to pursue the professional activity - Economic and financial standing - Technical and/or professional ability – Registration of contractors - Relevant entity – Obligation to take into accounts the resources of companies belonging to a holding in assessing suitability of dominant legal person of this group [Directive 2004/18/EC, article 45 *et seq.*]

The EU procurement directive is to be interpreted as meaning that the authority competent to decide on an application for registration submitted by a dominant legal person of a group is under an obligation, where it is established that that person actually has available to it the resources of the companies belonging to the group that are necessary to carry out the contracts,

to take into account the references of those companies in assessing the suitability of the legal person concerned, in accordance with the criteria mentioned in the directive.

22. Judgment of 15 January 1998, case C-44/96, Mannesmann

- **Contracting authorities - Body governed by public law** – Definition - Needs in the general interest, not having an industrial or commercial character - Body such as the Austrian State printing office - Included - Public works contracts - Definition – Works contracts awarded by the body in question - Included irrespective of the nature of the contract [Directive 2004/18/EC, article 1 (9)]

The EU procurement directive provides that bodies governed by public law mean any body established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, having legal personality and closely dependent on the State, regional or local authorities or other bodies governed by public law. The three conditions set out in the directive are cumulative. An entity such as the Austrian State Printing Office, must be regarded as a body governed by public law and thus as a contracting authority, in so far as: i. the documents which this office must produce are closely linked to public order and the institutional operation of the State and require guaranteed supply and production conditions which ensure that standards of confidentiality and security are observed. In that respect the condition that the body must have been established for the 'specific' purpose of meeting needs in the general interest, not having an industrial or commercial character, does not mean that it should be entrusted only, or even primarily, with meeting such needs; ii. this office has legal personality; iii. the Director-General of this office is appointed by a body consisting mainly of members appointed by the Federal Chancellery or various ministries, this office is subject to scrutiny by the Court of Auditors, the majority of its shares are still held by the Austrian State and a State control service is responsible for monitoring the printed matter which is subject to security measures. Contracts entered into by that entity are to be considered to be public contracts whatever their nature and irrespective of the relative proportion, whether large or small, which they represent of the activities of the State Printing Office pursued for the purpose of meeting needs not having an industrial or commercial character.

- **Contracting authorities - Body governed by public law** – Definition – Undertaking carrying on commercial activities and owned by a contracting authority – Excluded -Contract relating to a works project which, from the outset, falls within the objects of an undertaking which is not a contracting authority – Excluded [Directive 2004/18/EC, article 1(9)]

An undertaking which carries on commercial activities and in which a contracting authority, has a majority shareholding is not to be regarded as a body governed by public law within the meaning of the provisions of the EU procurement directive. Furthermore, a public contract is not subject to the provisions of the directive when it relates to a project which, from the outset, falls entirely within the objects of an undertaking which is not a contracting authority and when the contracts relating to that project were entered into by a contracting authority on behalf of that undertaking.

23. Judgment of 17 September 1998, case C-323/96, Commission/Belgium

- **Contracting authorities - State** - Definition - Bodies exercising legislative, executive and judicial powers - Bodies of the federal authorities of a federal State – Included [Directive 2004/18/EC, article 1(9)]

The term “the State” referred to in the definition of “contracting authority” in the EU procurement directive necessarily encompasses all the bodies which exercise legislative, executive and judicial powers. The same is true of the bodies which, in a federal State, exercise those powers at federal level.

24. Judgment of 10 November 1998, case C-360/96, Arnhem and Rheden/BFI

- **Contracting authorities – Body governed by public law** - Needs in the general interest, not having an industrial or commercial character - Meaning - Existence of private undertakings capable of satisfying such needs - Not relevant [Directive 2004/18/EC, article 1(9)]

The provision stipulating that “Body governed by public law means any body ... established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character”, must be interpreted as meaning that the Community legislature drew a distinction between needs in the general interest not having an industrial or commercial character and needs in the general interest having an industrial or commercial character.

The term “needs in the general interest not having an industrial or commercial character” does not exclude needs which are or can be satisfied by private undertakings as well. The fact that there is competition is not sufficient to exclude the possibility that a body financed or controlled by the State, territorial authorities or other bodies governed by public law may choose to be guided by other than economic considerations. The removal and treatment of household refuse may be regarded as constituting a need in the general interest. Since the degree of satisfaction of that need considered necessary for reasons of public health and environmental protection cannot be achieved by using disposal services wholly or partly available to private individuals from private economic operators, that activity is one of those which the State may require to be carried out by public authorities or over which it wishes to retain a decisive influence.

- **Contracting authorities** - Body governed by public law - Status not dependent on the relative importance of activities designed to satisfy needs in the general interest and of the way they are carried out [Directive 2004/18/EC, article 1(9)]

The status of a body governed by public law is not dependent on the relative importance, within its business as a whole, of the meeting of needs in the general interest not having an industrial or commercial character. It is likewise immaterial that commercial activities may be carried out by a separate legal person forming part of the same group or concern.

- **Contracting authorities** - Needs in the general interest, not having an industrial or commercial character - Legal form of provisions defining such needs - Not relevant [Directive 2004/18/EC, article 1 (9)]

The term “contracting authority” must be interpreted in functional terms. Therefore, the existence or absence of needs in the general interest not having an industrial or commercial character must be appraised objectively, the legal forms of the provisions in which those needs are mentioned being immaterial in that respect.

25. Judgment of 17 December 1998, case C-353/96, Commission/Ireland

- **Contracting authorities – Body governed by public law** - Bodies corresponding to legal persons governed by public law - Public authorities whose public supply contracts are subject to control by the State [Directive 2004/18/EC, article 1 (9)]

A body such as the Irish Forestry Board, although established in the form of a private company, is a contracting authority within the meaning of the EU procurement directive. Such a body, which has legal personality and does not award public contracts on behalf of the State or a regional or local authority, cannot be regarded as being the State or a regional or local authority, but constitutes a body governed by public law within the meaning of the EU procurement directive, where the State may exercise control, at least indirectly, over the award of public supply contracts.

26. Judgment of 16 September 1999, case C-27/98, Fracasso and Leitschutz

- **Award of contracts** – Whether it is compulsory to award the contract to the sole tenderer considered suitable - No such obligation [Directive 2004/18/EC, article 41 (1)]

The EU procurement directive must be interpreted as meaning that the contracting authority is not required to award the contract to the only tenderer judged to be suitable. In the first place, the directive contains no provision expressly requiring a contracting authority which has put out an invitation to tender, to award the contract to the sole tenderer; secondly, the contracting authority is not required to complete a procedure for the award of a public works contract.

27. Judgment of 18 November 1999, case C-107/98, Teckal

- **Scope of the directive - Contracting authorities** - “In-house”-service or public procurement contract? - Contracts awarded by a contracting authority to a distinct and independent body - Covered - Where the successful tenderer is itself a contracting authority – Irrelevant [Directive 2004/18/EC, article 1 (9)]

The EU procurement directive is applicable in cases where a contracting authority, such as a local authority, plans to conclude in writing, with an entity which is formally distinct from it and

independent of it in regard to decision-making a contract for pecuniary interest for the supply of products, whether or not that entity is itself a contracting authority. However this does not include the position where the local authority exercises over a legally distinct person a form of control similar to that exercised over its own departments and, at the same time, the person carries out the essential part of its activities together with the controlling local authority or authorities.

28. Judgment of 18 November 1999, case C-275/98, Unitron Scandinavia

- **Contract award procedures - Contracting authorities** - Where the contracting authority grants to a body other than such an authority the right to engage in a public service - Obligatory to require compliance with the principle of non-discrimination - No obligation to require compliance with tendering procedures [Directive 2004/18/EC, article 3]

Article 3 of the EU procurement directive is to be interpreted as follows: i. it requires a contracting authority which grants to a body other than such a contracting authority special or exclusive rights to engage in a public service activity to require of that body, in relation to the public supply contracts which it awards to third parties in the context of that activity, that it comply with the principle of non-discrimination on grounds of nationality; ii. it does not, however, require in those circumstances that the contracting authority demand that, in awarding such public supply contracts, the body in question comply with the tendering procedures laid down by the Directive.

29. Judgment of 2 December 1999, case C-176/98, Holst Italia

- **Criteria for qualitative selection** - Suitability to pursue the professional activity - Economic and financial standing - Technical and/or professional ability – Service provider relying on the standing of another company as proof of its own standing – Conditions [Directive 2004/18/EC, articles 45 to 52]

The EU procurement directive is to be interpreted as permitting a service provider to establish that it fulfils the economic, financial and technical criteria for participation in a tendering procedure for the award of a public contract by relying on the standing of other entities, regardless of the legal nature of the links which it has with them, provided that it is able to show that it actually has at its disposal the resources of those entities which are necessary for performance of the contract.

30. Judgment of 26 September 2000, case C-225/98, Commission/France

- **Contract award procedures - Common rules on advertising** - Publication of a prior information notice by the contracting authorities - Scope - Limits [Directive 2004/18/EC, article 35]

The purpose of the rules on advertising laid down in the EU procurement directive, including publication of the prior information notice, is to inform all potential tenderers at the Community level in good time about the main points of a contract in order that they may submit their tender within the time-limits. It follows from the provisions of the directive that the publication of a prior information notice is compulsory only where the contracting authorities exercise their option to reduce the time-limits for the receipt of tenders.

- **Contract award criteria** - Condition linked to the campaign against unemployment - Permissible - Conditions - Rules on advertising. [Directive 2004/18/EC, article 53 (1) (a)].

The criteria on which the contracting authorities are to base the award of contracts are either the lowest price only or, when the award is made to the most economically advantageous tender, various criteria according to the contract, such as price, period for completion, running costs, profitability, technical merit. In the latter case, the contracting authorities are required to state these criteria in the contract notice or the contract documents. None the less, that provision does not preclude all possibility for the contracting authorities to use as a criterion a condition linked to the campaign against unemployment provided that that condition is consistent with all the fundamental principles of Community law, in particular the principle of non-discrimination. Furthermore, even if such a criterion is not in itself incompatible with the EU procurement directive, it must be applied in conformity with all the procedural rules laid down in that directive, in particular the rules on advertising. It follows that an award criterion linked to the campaign against unemployment must be expressly mentioned in the contract notice so that contractors may become aware of its existence.

- **Contract award procedures** - Number of candidates invited to tender in the context of a restricted procedure - Limitation to a maximum number of five tenderers – Not permissible [Directive 2004/18/EC, article 44]

A Member State which, in contract notices, limits to five the number of candidates invited to tender in the context of a restricted procedure fails to fulfil its obligations under the EU procurement directive. Although it is true that the directive does not provide for a minimum number of candidates which the contracting authorities are required to invite where they do not opt in favour of fixing a range, the Community legislature none the less considered that, in the context of a restricted procedure and where the contracting authorities prescribe a range, a number of candidates below five is not sufficient to ensure genuine competition. The same must be true a fortiori in cases where the contracting authorities opt for inviting a maximum number of candidates. It follows that the number of undertakings which a contracting authority intends to invite to tender in the context of a restricted procedure cannot ever be less than five.

- **Criteria for qualitative selection** - Discriminating technical specifications - Designation of the lots by reference to classifications of national professional organisations - Proof of the tenderer's professional qualification - Requirement of proof of registration with the national Ordre des Architectes - Not permissible [Directive 2004/18/EC, article 2, articles 45 to 52]

A Member State which, in contract notices, uses as the mode of designating the lots references to classifications of national professional organisations and also requires from the designer, as

minimum standards for participation, proof of registration with the Ordre des Architectes fails to fulfil its obligations under the Treaty and under the EU procurement directive. To the extent that the designation of the lots by reference to classifications of French professional organisations is likely to have a dissuasive effect on tenderers who are not French, it thereby constitutes indirect discrimination and, therefore, a restriction on the freedom to provide services. Moreover, first, the requirement of proof that the designer is registered with the Ordre des Architectes can only give advantage to the provision of services by French architects, which constitutes discrimination against Community architects and, accordingly, a restriction on their freedom to provide services. Second, the EU procurement directive precludes a Member State from requiring a tenderer established in another Member State to furnish proof by any means other than those prescribed in that directive, that he satisfies the criteria laid down in those provisions and relating to his qualifications.

31. Judgment of 3 October 2000, case C-380/98, University of Cambridge

- **Contracting authorities** – Bodies governed by public law – Expression “financed, for the most part, by the State, regional or local authorities, or other bodies governed by public law” – Definition - Research awards and grants, student grants – Included – Payments made for the provision of services – Excluded – Percentage of public financing – Assessment [Directive 2004/18/EC, article 1 (9)]

In the definition of “Bodies governed by public law” provided by the EU procurement directive, the expression “financed, for the most part, by the State, regional or local authorities, or other bodies governed by public law”, properly construed, includes awards or grants paid by one or more contracting authorities for the support of research work and student grants paid by local education authorities to universities in respect of tuition for named students. Payments made by one or more contracting authorities either in the context of a contract for services comprising research work or as consideration for other services such as consultancy or the organisation of conferences do not, by contrast, constitute public financing within the meaning of those directives. On a proper construction, the term “for the most part”, cited above, means more than half. In order to determine correctly the percentage of public financing of a particular body, account must be taken of all of its income, including that which results from a commercial activity.

- **Contracting authorities** – Bodies governed by public law – Financed by the State – Definition – Percentage of public financing – Reference period – Determination [Directive 2004/18/EC, article 1 (9)]

The decision as to whether a body such as a university is a contracting authority within the meaning of the EU procurement directive must be made annually and the budgetary year in which the procurement procedure commences must be regarded as the most appropriate period for calculating the way in which that body is financed, so that the calculation must be made on the basis of the figures available at the beginning of the budgetary year, even if they are provisional. A body which constitutes a contracting authority for the purposes of the directive when a procurement procedure commences remains, as far as that procurement is concerned,

subject to the requirements of the directive until such time as the relevant procedure has been completed.

32. Judgment of 5 October 2000, case C-16/98, Commission/France

- **Public works contract** - Definition - Criterion - Economic and technical function of the result of the works - Artificial splitting of a single work – Assessment [Directive 2004/18/EC, article 1 (2)(b) , article 9 (3)]

The existence of a work must be assessed in the light of the economic and technical function of the result of the works concerned in order to determine whether several lots of a single work have been artificially split. An electricity supply network and a street lighting network have a different economic and technical function and works on the electricity supply and street lighting networks cannot be considered to constitute lots of a single work artificially split.

- **Public works contract** - Definition - Existence of a single contracting entity and possibility of a single undertaking's carrying out the whole of the works - Not decisive criteria [Directive 2004/18/EC, article 1 (2)(b)]

While the existence of a single contracting entity and the possibility of a Community undertaking's carrying out the whole of the works described in the contracts concerned may, according to circumstances, constitute corroborative evidence of the existence of a work within the meaning of the EU procurement directive, they cannot constitute decisive criteria on that point. The definition of the term “work” in the Directive does not make the existence of a work dependent on matters such as the number of contracting entities or whether the whole of the works can be carried out by a single undertaking.

- **Principle of non-discrimination between tenderers** - Scope [Directive 2004/18/EC, article 2]

The principle of non-discrimination between tenderers applies to all the stages of the tendering procedure and not only from the time when a contractor submits a tender. That interpretation is consistent with the purpose of the directive which is to open up the contracts to which it applies to Community competition. That purpose would be undermined if a contracting entity could organise a tendering procedure in such a way that contractors from Member States other than that in which the contracts are awarded were discouraged from tendering. It follows that the directive, in prohibiting any discrimination between tenderers, also protects those who are discouraged from tendering because they have been placed at a disadvantage by the procedure followed by a contracting entity.

33. Judgment of 7 December 2000, case C-94/99, ARGE Gewässerschutz

- **Principle of equal treatment** - Participation of tenderers receiving subsidies from contracting authorities enabling them to submit tenders at prices lower than those of their competitors - No covert discrimination [Directive 2004/18/EC, article 2]

The mere fact that the contracting authority allows bodies receiving subsidies of any kind, whether from that contracting authority or from other authorities, which enable them to submit tenders at prices appreciably lower than those of the other, unsubsidised, tenderers, to take part in a procedure for the award of a public service contract does not amount to a breach of the principle of equal treatment laid down in the EU procurement directive. The mere fact that a contracting authority allows such bodies to take part in a procedure for the award of a public service contract does not constitute either covert discrimination or a restriction contrary to the Treaty.

34. Judgment of 7 December 2000, case C-324/98, Telaustria Verlag

- **Scope of the EU procurement directive** - Public service concession – Excluded – Obligation of transparency of the contracting authority [Directive 2004/18/EC, article 2 and 17]

Notwithstanding the fact that, as Community law stands at present, public service concessions are excluded from the scope of the EU procurement directive, the contracting entities concluding them are, none the less, bound to comply with the fundamental rules of the Treaty, in general, and the principle of non-discrimination on the ground of nationality. The obligation of transparency which is imposed on the contracting authority consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of procurement procedures to be reviewed.

35. Judgment of 1st February 2001, case C-237/99, Commission/France

- **Contracting authorities - Bodies governed by public law** - Definition - Low-rent housing corporations – Included – Conditions [Directive 2004/18/EC, article 1(9)]

A body governed by public law means a body established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, which has legal personality and is closely dependent on the State, regional or local authorities or other bodies governed by public law. With regard to that third condition characterising a body governed by public law : since

management supervision constitutes one of the three criteria referred to in the directive, it must give rise to dependence on the public authorities equivalent to that which exists where one of the other alternative criteria is fulfilled, namely where the body in question is financed, for the most part, by the public authorities or where the latter appoint more than half of the members of the managerial organs of the body. Consequently, low-rent housing corporations which meet needs

in the general interest, not having an industrial or commercial character, which have legal personality and whose management is subject to supervision by the public authorities which allows the latter to influence their decisions in relation to public contracts, fulfil the three cumulative conditions which characterise a body governed by public law within the meaning of the EU procurement directive and are contracting authorities.

36. Judgment of 10 May 2001, joined cases C-223 and 260/99, *Agora and Excelsor*.

- **Contracting authorities - Body governed by public law** - Meaning - Needs in the general interest, not having an industrial or commercial character –Body which carries on activities relating to the organization of fairs and exhibitions, which operates according to performance criteria and in a competitive environment - Exclusion [Directive 2004/18/EC, article 1 (9)]

A body governed by public law means a body established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, with legal personality and closely dependent on the State, regional or local authorities or other bodies governed by public law. The first condition is not met by a body whose object is to carry on activities relating to the organization of fairs, exhibitions and other similar initiatives, which is non-profit-making but is administered according to the criteria of performance, efficiency and cost-effectiveness, and which operates in a competitive environment.

37. Judgment of 12 July 2001, case C-399/98, *Ordine degli Architetti*

- **Contract award procedures** - Purpose – Effectiveness [Provisions of the EC Treaty concerning the common market fundamental freedoms]

The EU procurement directive aims to abolish restrictions on the freedom of establishment and on the freedom to provide services in respect of public contracts in order to open up such contracts to genuine competition. The development of such competition entails the publication at Community level of contract notices. Exposure to Community competition in accordance with the procedures provided for by the Directive ensures that the public authorities cannot indulge in favouritism.

- **Scope of the EU procurement directive** - National rule providing for the direct execution of infrastructure works of a value equal to or exceeding the ceiling fixed by the directive by a holder of a building permit or approved development plan by way of set-off against a contribution - Not permissible [Directive 2004/18/EC, articles 1(2)(b) and 1(9)]

The EU procurement directive precludes national urban development legislation under which, without the procedures laid down in the directive being applied, the holder of a building permit or approved development plan may execute infrastructure works directly, by way of total or partial set-off against the contribution payable in respect of the grant of the permit, in cases where the value of that work is the same as or exceeds the ceiling fixed by the Directive.

38. Judgment of 18 October 2001, case C-19/00, SIAC Construction

- **Award of contracts** - Principle of equal treatment - Scope [Directive 2004/18/EC, article 2]

Compliance with the principle that tenderers must be treated equally, which lies at the very heart of the EU procurement directive, requires that tenderers be in a position of equality both when they formulate their tenders and when those tenders are being assessed by the adjudicating authority

- **Contract award criteria** - Most economically advantageous tender – Choice of criteria by the awarding authority – Limits [Directive 2004/18/EC, article 54]

The EU procurement directive does not list exhaustively the criteria which may be accepted as criteria for the award of a public works contract. The choice of criteria made by the appointing authority may, however, relate only to criteria designed to identify the offer which is economically the most advantageous and must not confer on the adjudicating authority an unrestricted freedom of choice as regards the awarding of the contract to a tenderer.

- **Contract award criteria** - Award criterion relating to a factual element that could be known precisely only after the contract had been awarded - Whether permissible - Conditions - Compliance with the principle of equal treatment [Directive 2004/18/EC, article 2 and 54]

In the case of the award of a public contract coming within the scope of the EU procurement directive, the use of a criterion for awarding the contract which relates to a factual element that will be known precisely only after the contract has been awarded will be compatible with the requirements of equal treatment of tenderers only on condition that the transparency and objectivity of the procedure are respected. This presupposes that the criterion is mentioned in the contract documents or contract notice, that it is there formulated in such a way as to allow all reasonably well-informed and normally diligent tenderers to interpret it in the same way, and that the adjudicating authority must keep to that interpretation throughout the procedure and apply the criterion in question objectively and uniformly to all tenderers. Objectivity may be guaranteed by recourse to the professional opinion of an expert, on condition that his report is based, in all essential respects, on objective factors regarded in good professional practice as being relevant and appropriate to the assessment made.

39. Judgment of 27 November 2001, joined cases C-285 and 286/99, Lombardini and Mantovani

- **Award of contracts** - Abnormally low tenders - Automatic exclusion – Not permissible - Duty to use an examination procedure allowing the parties to be heard - Application of a mathematical criterion for identifying abnormally low tenders not revealing the exclusion threshold to the undertakings concerned before submission of their tenders - Whether permissible - Conditions - Exclusion of certain justifications - Not permissible [Directive 2004/18/EC, article 55]

The EU procurement directive must be interpreted as precluding legislation and administrative practice of a Member State which allow the contracting authority to reject tenders offering a greater discount than the anomaly threshold as abnormally low, taking into account only those explanations of the prices proposed, covering at least 75% of the basic contract value mentioned in the contract notice, which tenderers were required to attach to their tender, without giving the tenderers the opportunity to argue their point of view, after the opening of the envelopes, on those elements of the prices proposed which gave rise to suspicions, and, require the contracting authority to take into consideration, for the purposes of examining abnormally low tenders, only explanations based on the economy of the construction method, technical solutions chosen, or exceptionally favourable conditions available to the tenderer, but not explanations relating to all those elements for which minimum values are laid down by law, regulation or administrative provision or can be ascertained from official data. However, provided all the requirements it imposes are otherwise complied with and the aims pursued by the EU procurement directive are not defeated, that directive does not in principle preclude legislation and administrative practice of a Member State which, in the matter of identifying and examining abnormally low tenders, i. require all tenderers, under threat of exclusion from participation in the contract, to accompany their tender with explanations of the prices proposed, covering at least 75% of the basic value of that contract, and, ii. apply a method of calculating the anomaly threshold based on the average of all the tenders received for the tender procedure in question, so that tenderers are not in a position to know that threshold at the time they lodge their file, the result produced by applying that calculation method having, however, to be capable of being reconsidered by the contracting authority.

40. Judgment of 17 September 2002, case C-513/99, Concordia Bus Finland

- **Contract award criteria** - Most economically advantageous tender - Protection of the environment - Whether permissible - Conditions - Criterion which can be satisfied only by a few undertakings, one of which belongs to the contracting entity - No effect - Principle of equal treatment - Principle of non-discriminatory treatment [Directive 2004/18/EC, articles 2, 26, 23 (6), 48 (2) (f), 50, 53]

The EU procurement directive must be interpreted as meaning that where, in the context of a public contract for the provision of urban bus transport services, the contracting authority decides to award a contract to the tenderer who submits the economically most advantageous tender, it may take into consideration ecological criteria such as the level of nitrogen oxide emissions or the noise level of the buses, provided that they are linked to the subject-matter of the contract, do not confer an unrestricted freedom of choice on the authority, are expressly mentioned in the contract documents or the tender notice, and comply with all the fundamental principles of Community law, in particular the principle of non-discrimination. Moreover, the principle of equal treatment does not preclude the taking into consideration of such criteria solely because the contracting entity's own transport undertaking is one of the few undertakings able to offer a bus fleet satisfying those criteria.

41. Judgment of 14 November 2002, case C-411/00, Felix Swoboda

- **Contract award procedures- Public service contracts - Qualification of services (A or B) – Services falling partly within Annex II A and partly within Annex II B – Determination of the applicable regime – Criteria – Main purpose of the contract – Excluded – Comparison of the value of the services [Directive 2004/18/EC, article 22]**

The determination of the regime applicable to public service contracts composed partly of services falling within Annex II A and partly of services falling within Annex II B to the EU procurement directive does not depend on the main purpose of those contracts and is to be made in accordance with the unequivocal test laid down by that directive, based on the comparison of the value of the services covered by Annex II A with that of the services covered by Annex II B.

- **Contract award procedures- Public service contracts – Contract with a single purpose but composed of several services – Classification in Annexes II A and II B – Whether permissible – Obligation to award separate contracts when the value of services in Annex II B exceeds that of the services falling within Annex II A – No such obligation [Directive 2004/18/EC, article 22]**

In the context of the award of a contract with a single object but composed of several services, the classification of those services in Annexes II A and II B to the EU procurement directive, far from depriving it of its effectiveness, is in accordance with the system laid down by the directive. When, following the classification thus made by reference to the CPC nomenclature, the value of the services falling within Annex II B exceeds the value of the services falling within Annex II A, there is no obligation on the part of the contracting authority to separate from the contract in question the services referred to in Annex II B and to award separate contracts in respect of them. The position would only be different if the contracting authority artificially grouped in one contract services of different types without there being any link arising from a joint purpose or operation, with the sole purpose of increasing the proportion of the services referred to in Annex II B in the contract and thus of avoiding, by way of the second sentence of Article 10, the application of its provisions in full.

42. Judgment of 12 December 2002, case C-470/99, Universale-Bau

- **Contracting authorities - Body governed by public law – Definition – Body which was not established to satisfy specific needs in the general interest, not having an industrial or commercial character, but in the meantime satisfying such needs – Covered [Directive 2004/18/EC, article 1 (9)]**

The EU procurement directive provides that a ‘body governed by public law’ means, among others conditions, a body established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character. For the purposes of deciding whether a body satisfies that condition, it is necessary to consider the activities which it actually carries on. It follows that a body which was not established to satisfy specific needs in the general interest not having an industrial or commercial character, but which has subsequently taken

responsibility for such needs, which it has since actually satisfied, fulfils that condition provides that the assumption of responsibility for the satisfaction of those needs can be established objectively.

- **Criteria for qualitative selection** – Restricted procedure – Rules laid down in advance for weighting the criteria for selecting the candidates invited to tender – Publication required [Directive 2004/18/EC, articles 44 to 52]

The EU procurement directive is to be interpreted as meaning that where, in the context of a restricted procedure, the contracting authority has laid down in advance the rules for weighting the criteria for selecting the candidates who will be invited to tender, it is obliged to state them in the contract notice or tender documents. Such an interpretation is the only one which is apt to guarantee an appropriate level of transparency and, therefore, compliance with the principle of equal treatment in the procedures awarding contracts to which that directive applies.

43. Judgment of 23 January 2003, case C-57/01, Makedoniko Metro and Michaniki

- **Contract award procedures** - Group of tenderers – National rules prohibiting a change in the composition of the group after submission of tenders – Whether permissible [Directive 2004/18/EC, article 4]

The EU procurement directive does not preclude national rules which prohibit a change in the composition of a group of contractors taking part in a procedure for the award of a public works contract or a public works concession which occurs after submission of tenders. Rules about the composition of such consortia are a matter for the Member States, since the only provision of the directive dealing with groups of contractors is confined, first, to stating that tenders may be submitted by such groups and, second, to preventing them from being required to assume a specific legal form before the contract has been awarded to the group selected, and contains no provision about the composition of such groups.

44. Judgment of 27 February 2003, case C-373/00, Adolf Truley

- **Contracting authorities - Body governed by public law** – Needs in the general interest - Definition - Needs in the general interest, not having an industrial or commercial character [Directive 2004/18/EC, article 1 (9)]

In order for a body to be designated as a “body governed by public law” and, therefore, a “contracting authority” within the meaning of the EU procurement directive, that body must meet needs in the general interest which are not industrial or commercial in character, have legal personality and depend heavily, for its financing, management or supervision, on the State, regional or local authorities or other bodies governed by public law. The term “needs in the general interest” is an autonomous concept of Community law which must be interpreted in the light of the context and the aims of the directive. The activities of funeral undertakers may indeed be regarded as meeting a need in the general interest. First, such activities are linked to public

policy in so far as the State has a clear interest in exercising close control over the issue of certificates such as birth and death certificates and, second, the State may be justified in retaining influence over those activities on manifest grounds of hygiene and public health. The fact that a regional or local authority is legally obliged to arrange funerals - and, where necessary, to bear the costs of those funerals - where they have not been arranged within a certain period after a death certificate has been issued constitutes evidence that there is such a need in the general interest. With respect to the question whether the activities of funeral undertakers meets a need in the general interest, not having an industrial or commercial character within the meaning of the directive, the existence of significant competition, although not entirely irrelevant, does not, of itself, allow the conclusion to be drawn that there is no need in the general interest not having an industrial or commercial character. The national court must assess whether or not there is such a need, taking account of all the relevant legal and factual circumstances, such as those prevailing at the time of establishment of the body concerned and the conditions under which it exercises its activity.

- **Contracting authorities - Body governed by public law** – Criterion of management supervision by public authorities – Mere review insufficient [Directive 2004/18/EC, article 1 (9)]

A mere review does not satisfy the criterion of management supervision by the State, regional or local authorities or other bodies governed by public law in the EU procurement directive since, by definition, such supervision does not enable the public authorities to influence the decisions of the body in question in relation to public contracts. That criterion is, however, satisfied where the public authorities supervise not only the annual accounts of the body concerned but also its conduct from the point of view of proper accounting, regularity, economy, efficiency and expediency and where those public authorities are authorised to inspect the business premises and facilities of that body and to report the results of those inspections to a regional authority which holds, through another company, all the shares in the body in question.

45. Judgment of 10 April 2003, joined cases C-20 and 28/01, Commission/Germany

- **Contract award procedures** – Negotiated procedure without prior publication of a contract notice – Conditions governing permissibility – Technical or artistic reasons, or reasons connected with the protection of exclusive rights – Meaning – Environmental protection – Whether included [Directive 2004/18/EC, articles 2, 31 (1)(b), 50]

A contracting authority may take into account criteria relating to environmental protection at the various stages of a procedure for the award of public contracts. Therefore, environmental protection is capable of constituting a technical reason for the purposes of the provisions in the EU procurement directive stipulating that contracting authorities may award public contracts by negotiated procedure without prior publication of a contract notice when, for technical or artistic reasons, or for reasons connected with the protection of exclusive rights, the works, supply and services may be provided only by a particular economic operator.

However, the procedure used where there is a technical reason of that kind must comply with the fundamental principles of Community law, in particular the principle of nondiscrimination as it follows from the provisions of the Treaty on common market fundamental freedoms.

46. Judgment of 15 May 2003, case C-214/00, Commission/Spain

- **Contracting authorities – Body governed by public law** – Definition – National legislation excluding commercial companies under public control – Not permissible [Directive 2004/18/EC, article 1 (9)]

National legislation that automatically excludes commercial companies under public control from the scope *ratione personae* of the EU procurement directive is not a correct transposition of the term “contracting authority” appearing in that directive. An entity's private law status does not constitute a criterion for precluding it from being classified as a contracting authority within the meaning of the EU procurement directive, since the application of that directive to an entity which fulfils the three cumulative conditions set out therein, according to which it must be a body established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, which has legal personality and is closely dependent on the State, regional or local authorities or other bodies governed by public law, cannot be excluded solely on the basis of the fact that, under the national law to which it is subject, its legal form and rules which govern it fall within the scope of private law.

47. Judgment of 22 May 2003, case C-18/01, Korhonen and others

- **Contracting authorities - Body governed by public law** – Definition – Company set up by a regional or local authority to promote the development of industrial or commercial activities on the territory of that authority - Needs in the general interest, not having an industrial or commercial character – Assessment by the national courts - Criteria [Directive 2004/18/EC, article 1 (9)]

A limited company established, owned and managed by a regional or local authority meets a need in the general interest, within the meaning of the of the EU procurement directive, where it acquires services with a view to promoting the development of industrial or commercial activities on the territory of that regional or local authority by constructing premises to be leased to undertakings. Such activities are likely to give a stimulus to trade and the economic and social development of the local authority concerned, since the location of undertakings on the territory of a municipality often has favourable repercussions for that municipality in terms of creation of jobs, increase of tax revenue and improvement of the supply and demand of goods and services. To determine whether that need has no industrial or commercial character, the national court must assess the circumstances which prevailed when that company was set up and the conditions in which it carries on its activity, taking account in particular of the fact that it does not aim primarily at making a profit, the fact that it does not bear the risks associated with the activity, and any public financing of the activity in question. The fact that the premises to be constructed are leased only to a single undertaking is not capable of calling into question the

lessor's status of a body governed by public law, where it is shown that the lessor meets a need in the general interest not having an industrial or commercial character.

48. Judgment of 19 June 2003, case C-315/01, GAT

- **Contract award criteria** - Taking account of a list of the previous principal deliveries - Not permissible [Directive 2004/18/EC, article 53]

The EU procurement directive precludes the contracting authority, in a procedure to award a public contract, from taking account of the number of references relating to the products offered by the tenderers to other customers not as a criterion for establishing their suitability for carrying out the contract but as a criterion for awarding the contract. The submission of a list of the principal deliveries effected in the past three years, stating the sums, dates and recipients, public or private, involved is expressly included among the references or evidence which may be required to establish the suppliers' technical capacity. Furthermore, a simple list of references, such as that called for in the invitation to tender at issue in the main proceedings, which contains only the names and number of the suppliers' previous customers without other details relating to the deliveries effected to those customers cannot provide any information to identify the offer which is the most economically advantageous within the meaning of the Directive, and therefore cannot in any event constitute an award criterion within the meaning of that provision.

- **Contract award criteria** - Requirement that the products which are the subject of the tenders be available for inspection by the contracting authority within some fixed radius – Not permissible [Directive 2004/18/EC, article 53]

The EU procurement directive precludes, in a procedure to award a public contract, the requirement that the products which are the subject of the tenders be available for inspection by the contracting authority within a radius of 300 km of the authority as a criterion for the award of the contract. Firstly, it is apparent from the Directive that for public contracts the contracting authorities may require the submission of samples, descriptions and/or photographs of the products to be supplied as references or evidence of the suppliers' technical capacity to carry out the contract concerned. Secondly, such a criterion cannot serve to identify the most economically advantageous offer within the meaning of the Directive and therefore cannot, in any event, constitute an award criterion within the meaning of that provision.

49. Judgment of 16 October 2003, case C-421/01, Traunfellner

- **Award of contracts** – Variants - Conditions for consideration and assessment for the purpose of awarding a contract [Directive 2004/18/EC, article 24]

The EU procurement directive is to be interpreted as meaning that the obligation to set out the minimum specifications required by a contracting authority in order to take variants into consideration is not satisfied where the contract documents merely refer to a provision of national legislation requiring an alternative tender to ensure the performance of work which is

qualitatively equivalent to that for which tenders are invited. Tenderers may be deemed to be informed in the same way of the minimum specifications with which their variants must comply in order to be considered by the contracting authority only where those specifications are set out in the contract documents. This involves an obligation of transparency designed to ensure compliance with the principle of equal treatment of tenderers, which must be complied with in any procurement procedure governed by the Directive. The provision of the Directive which lists the permissible criteria for the award of contracts, can apply only to variants which have been properly taken into consideration by the contracting authority in accordance with the Directive.

50. Judgment of 16 October 2003, case C-283/00, Commission/Spain

- **Contracting authorities - Body governed by public law** – Definition - Needs in the general interest, not having an industrial or commercial character – State commercial company governed by private law - Company's object consisting of the implementation of a plan for repaying the costs of and establishing prisons – Included [Directive 2004/18/EC, article 1(9)]

The concept of “Needs in the general interest, not having an industrial or commercial character” is one of Community law and must accordingly be given an autonomous and uniform interpretation throughout the Community, the search for which must take account of the background to the provision in which it appears and of the purpose of the rules in question. Those needs are generally needs which are satisfied otherwise than by the supply of goods and services in the marketplace and which, for reasons associated with the general interest, the State chooses to provide itself or over which it wishes to retain a decisive influence. Whether or not there exists a need in the general interest not having an industrial or commercial character account must be taken of relevant legal and factual circumstances, such as those prevailing when the body concerned was formed and the conditions in which it carries on its activity, including, inter alia, lack of competition on the market, the fact that its primary aim is not the making of profits, the fact that it does not bear the risks associated with the activity, and any public financing of the activity in question. As a matter of fact, if the body operates in normal market conditions, aims at making a profit and bears the losses associated with the exercise of its activity, it is unlikely that the needs it aims at meeting are not of an industrial or commercial nature. It follows that a State commercial company established for the specific purpose of putting into effect, alone, the programmes and actions provided for in the plan for paying off the costs of and establishing prisons for the purpose of implementing the Member State's prison policy must be treated as a body governed by public law for the purposes of the EU procurement Directive and, therefore, as a contracting authority. The needs in the general interest which such a company is responsible for meeting being, therefore, a necessary condition of the exercise of the State's penal powers they are intrinsically linked to public order.

51. Judgment of 16 October 2003, case C-252/01, Commission/Belgium

- **Scope of the EU procurement directive** – Execution of services accompanied by special security measures - Contract for surveillance of a Member State coast by aerial photography [Directive 2004/18/EC, article 14]

When the execution of the services concerning the surveillance of a Member State coast by aerial photography must be accompanied by special security measures within the meaning of the EU procurement directive, the directive does not apply to such services.

52. Judgment of 4 December 2003, case C-448/01, EVN and Wienstrom

- **Contract award criteria** - Concept of the most economically advantageous tender – “Green” award criterion giving preference to electricity produced from renewable energy sources – Permissible – Conditions [Directive 2004/18/EC, article 53]

The EU procurement directive does not preclude a contracting authority from applying, in the context of the assessment of the most economically advantageous tender for a contract for the supply of electricity, an award criterion with a weighting of 45% which requires that the electricity supplied be produced from renewable energy sources. The fact that that criterion does not necessarily serve to achieve the objective pursued is irrelevant in that regard. On the other hand, that legislation does preclude such a criterion where – it is not accompanied by requirements which permit the accuracy of the information contained in the tenders to be effectively verified, – it requires tenderers to state how much electricity they can supply from renewable energy sources to a non-defined group of consumers, and allocates the maximum number of points to whichever tenderer states the highest amount, where the supply volume is taken into account only to the extent that it exceeds the volume of consumption expected in the context of the procurement. It is for the national court to determine whether, despite the contracting authority's failure to stipulate a specific supply period, the award criterion was sufficiently clearly formulated to satisfy the requirements of equal treatment and transparency of procedures for awarding public contracts.

53. Judgment of 14 September 2004, case C-385/02, Commission/Italy

- **Contract award procedure**- Derogations from the common rules - Strict interpretation- Existence of exceptional circumstances - Burden of proof [Directive 2004/18/EC, article 31]

The provisions the EU procurement Directive, which authorise derogations from the rules intended to ensure the effectiveness of the rights conferred by the TFEU in relation to public works contracts, must be interpreted strictly and the burden of proving the existence of exceptional circumstances justifying a derogation lies on the person seeking to rely on those circumstances. Since the directive authorises the use of the negotiated procedure without prior publication of a contract notice for works which, for technical reasons, may only be carried out by

a particular contractor, the Member State authorities must prove that technical reasons made it necessary to award the relevant contracts to the contractor who was entrusted with the original contract.

It is true that the aim of ensuring the continuity of works under complex projects which relate to the flood safety of an area is a technical reason which must be recognised as being important. However, merely to state that a package of works is complex and difficult is not sufficient to establish that it can only be entrusted to one contractor, particularly where the works are subdivided into lots which will be carried out over many years.

- **Contract award procedures-** Derogations from the common rules - Application of negotiated procedure without justification - Repetition of similar works entrusted to the undertaking to which an earlier contract was awarded – Duration [Directive 2004/18/EC, article 31]

The EU procurement Directive authorises the use of the negotiated procedure without prior publication of a contract notice for new works consisting in the repetition of similar works entrusted to the undertaking to which an earlier contract was awarded. That procedure may only be adopted “during the three years following the conclusion of the original contract”. In the light of a comparison of the language versions of that provision, the expression “conclusion of the original contract” must be understood as meaning the time when the original contract was entered into and not as referring to the completion of the works to which the contract relates. That interpretation is confirmed by the objective of the provision in question and its place in the scheme of the Directive. First, as it is a derogating provision which falls to be strictly interpreted, the interpretation which restricts the period during which the derogation applies must be preferred rather than that which extends it. That objective is met by the interpretation which takes the starting point as being the date on which the original contract is entered into rather than the, necessarily later, date on which the works which are its subject-matter are completed. Secondly, legal certainty, which is desirable where procedures for the award of public procurement contracts are involved, requires that the date on which the period in question begins can be defined in a certain and objective manner. While the date on which a contract is entered into is certain, numerous dates may be treated as representing the completion of the works and thus give rise to a corresponding level of uncertainty. Moreover, while the date on which the contract is entered into is clearly established at the outset, the date of completion of the works, whatever definition is adopted, may be altered by accidental or voluntary factors for so long as the contract is being carried out.

54. Judgment of 7 October 2004, case C-247/02, Sintesi

- **Award of contracts** - Right of the contracting authority to choose between the criterion of the lower price and that of the more economically advantageous tender [Directive 2004/18/EC, article 53]

The EU procurement Directive is to be interpreted as meaning that it precludes national rules which, for the purpose of the award of public works contracts following open or restricted

tendering procedures, impose a general and abstract requirement that the contracting authorities use only the criterion of the lowest price. Indeed, such a national rule deprives the contracting authorities of the possibility of taking into consideration the nature and specific characteristics of such contracts, taken in isolation, by choosing for each of them the criterion most likely to ensure free competition and thus to ensure that the best tender will be accepted.

55. Judgment of 14 October 2004, case C-340/02, Commission/France

- **Principle of equal treatment - Principle of transparency** [Directive 2004/18/EC, article 2]

The principle of equal treatment of providers and the principle of transparency laid down in the EU procurement directive require the subject-matter of each contract and the criteria governing its award to be clearly defined. That obligation exists where the subject-matter of a contract and the criteria selected for its award must be regarded as decisive for the purposes of determining which of the procedures provided for in the Directive is to be implemented and assessing whether the requirements related to that procedure have been observed.

- **Contract award procedures-** Application of negotiated procedure without justification – Contract in several phases - Mandatory publication – Infringement [Directive 2004/18/EC, article 31]

The EU procurement Directive authorises contracting authorities using a negotiated procedure to derogate from the obligation of prior publication in certain cases which are exhaustively listed, derogation is permissible “where the contract concerned follows a design contest and must, under the rules applying, be awarded to the successful candidate or to one of the successful candidate”. That provision, must be interpreted strictly and the burden of proving the existence of exceptional circumstances justifying a derogation lies on the person seeking to rely on those circumstances. In particular, the expression “follows a design contest” as used in the Directive implies that there must be a direct functional link between the contest and the contract concerned. Since the contest in question related to the first phase and was organized for the purpose of awarding the contract envisaged in that phase, the contract in the second phase cannot be regarded as following that contest.

56. Judgment of 18 November 2004, case C-126/03, Commission/Germany

- **Scope of the EU procurement directive** - Contract concluded by a contracting authority in relation to an economic activity subject to competition - Contract concluded by a contracting authority in order to be able to submit an offer in a tender procedure – Included [Directive 2004/18/EC, article 1(9)]

The EU procurement directive provides that, where contracts for pecuniary interest concluded in writing between a service provider and a regional or local authority have as their object the services listed in Annex I A to the directive, they must be the subject of an open, restricted or negotiated procedure within the meaning of that directive. In that regard the directive makes no

distinction between public contracts awarded by a contracting authority for the purposes of fulfilling its task of meeting needs in the general interest and those which are unrelated to that task. It is likewise irrelevant that the contracting authority intends to operate as a provider of services itself and that the contract in question aims, in that context, to subcontract a part of the activities to a third party.

57. Judgment of 11 January 2005, case C-26/03, Stadt Halle and RPL Lochau

- **Scope of the directive - Contracting authorities** - “In-house”-services – Contracting authority having a holding in the capital of a company legally distinct from it [Directive 2004/18/EC, article 1(9)]

Where a contracting authority intends to conclude a contract for pecuniary interest relating to services within the material scope of the EU procurement Directive with a company legally distinct from it, in whose capital it has a holding together with one or more private undertakings, even as a majority, the public award procedures laid down by that directive must always be applied.

58. Judgment of 13 January 2005, case C-84/03, Commission/Spain

- **Contracting authorities - Body governed by public law** – Definition – National legislation excluding the bodies of private law satisfying the conditions laid down in the EU procurement directive – Not permissible [Directive 2004/18/EC, article 1(9)]

In order to determine whether a private law body is to be classified as a body governed by public law it is only necessary to establish whether the body in question satisfies the three cumulative conditions laid down in the EU procurement directive since an entity's private law status does not constitute a criterion for precluding it from being classified as a contracting authority for the purposes of those directives. Thus, a national legislation constitutes an incorrect transposition of the definition of “contracting authority” in so far as it excludes the bodies of private law from its scope, even though they may satisfy the conditions laid down in the directive.

- **Public contract** – Definition – National legislation excluding the cooperation agreements concluded between bodies governed by public law - Not permissible [Directive 2004/18/EC, article 1(2)(a)]

In order to have a public contract within the meaning of the EU procurement directive, it is sufficient, in principle, if the contract was concluded between a local authority and a person legally distinct from it. 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. Consequently, in so far as it excludes, a priori, from its scope relations between public authorities, their public bodies and, in a general manner,

non-commercial bodies governed by public law, whatever the nature of those relations, national legislation constitutes an incorrect transposition of the EU procurement directive.

- **Contract award procedures** – Derogations from the common rules – Strict interpretation - Use of the negotiated procedure in cases not provided for by the directive [Directive 2004/18/EC, article 31]

The derogations from the rules intended to ensure the effectiveness of the rights conferred by the Treaty in connection with public contracts must be interpreted strictly. To prevent the EU procurement directive being deprived of their effectiveness, the Member States cannot therefore, provide for the use of the negotiated procedure in cases not provided for in the Directives or add new conditions to the cases expressly provided for by that directives which make that procedure easier to use. It is for the Member States to show that their legislation constitutes a faithful transposition of the cases expressly provided for by the directive.

59. Judgment of 3 March 2005, joined cases C-21 and 34/03, Fabricom

- **Principle of non-discrimination between tenderers** - Prohibition on participation in a procedure of submission of a tender by a person who has contributed to the development of the works, supplies or services concerned – Not permissible [Directive 2004/18/EC, article 2]

The EU procurement Directive precludes a national regulation, whereby a person who has been instructed to carry out research, experiments, studies or development in connection with public works, supplies or services is not permitted to apply to participate in or to submit a tender for those works, supplies or services and where that person is not given the opportunity to prove that, in the circumstances of the case, the experience which he has acquired was not capable of distorting competition. Taking account of the favourable situation in which a person who has carried out certain preparatory work may find himself, therefore, it cannot be maintained that the principle of equal treatment requires that that person be treated in the same way as any other tenderer. Nevertheless, a rule goes beyond what is necessary to attain the objective of equal treatment for all tenderers when it does not afford a person who has carried out certain preparatory work any possibility to demonstrate that in his particular case, that situation would not be capable of distorting competition between tenderers.

60. Judgment of 21 July 2005, case C-231/03, Coname

- **Common market fundamental freedoms** – Direct award of a concession for the management of a public gas-distribution service – Not permissible without appropriate transparency [Provisions of the TFEU concerning the common market fundamental freedoms] [Directive 2004/18/EC, article 17]

The provisions of the Treaty on the common market fundamental freedoms preclude the direct award by a municipality of a concession for the management of the public gas-distribution

service to a company in which there is a majority public holding and in which the municipality in question has a 0.97% holding, if that award does not comply with transparency requirements. Without necessarily implying an obligation to hold an invitation to tender, those requirements are, in particular, such as to enable an undertaking located in the territory of a Member State other than that of the municipality in question to have access to appropriate information regarding that concession, so that, if that undertaking had so wished, it would have been in a position to express its interest in obtaining that concession.

61. Judgment of 13 October 2005, case C-458/03, Parking Brixen

- **Scope of the EU procurement directive** - Public service concession – Management of public pay car parks – Excluded [Directive 2004/18/EC, article 17]

The award, by a public authority to a service provider, of the management of a public pay car park, in consideration for which that provider is remunerated by sums paid by third parties for the use of that car park, is a public service concession to which the EU procurement Directive does not apply.

- **Principle of equal treatment and non-discrimination** – Common market fundamental freedoms – Scope - Public service concession contracts – Included – Limits [Provisions of the EC Treaty concerning the common market fundamental freedoms] [Directive 2004/18/EC, article 2]

The public authorities concluding public service concession contracts are, bound to comply with the fundamental rules of the TFEU, in general, and the principle of nondiscrimination on the ground of nationality, in particular, which are specific expressions of the general principle of equal treatment. The principles of equal treatment and nondiscrimination on grounds of nationality imply, in particular, a duty of transparency which enables the concession-granting public authority to ensure that those principles are complied with. That obligation of transparency which is imposed on the public authority consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the service concession to be opened up to competition and the impartiality of procurement procedures to be reviewed. Nevertheless, in the field of public service concessions, the application of the fundamental rules of the TFEU as well as the general principles of which they are the specific expression, is precluded if the control exercised over the concessionaire by the concession-granting public authority is similar to that which the authority exercises over its own departments and if, at the same time, that entity carries out the essential part of its activities with the controlling authority. The aforementioned rules and principles are to be interpreted as precluding a public authority from awarding, without putting it out to tender, a public service concession to a company limited by shares which resulted from the conversion of a special undertaking of that public authority, whose objects have been extended to significant new areas, whose capital must obligatorily be opened in the short term to other capital, the geographical area of whose activities has been extended to the entire country and abroad, and whose Administrative Board possesses very broad management powers which it can exercise independently.

62. Judgment of 20 October 2005, case C-264/03, Commission/France

- **Common market fundamental freedoms** – Public contracts excluded from the scope of the EU procurement directive – Obligation to respect the fundamental rules of the Treaty [Directive 2004/18/EC, article 2]

The provisions of the TFEU relating to freedom of movement are intended to apply to public contracts which are outside the scope of the EU procurement Directive. Although certain contracts are excluded from the scope of Community directives in the field of public procurement, the contracting authorities which conclude them are nevertheless bound to comply with the fundamental rules of the Treaty and the principle of nondiscrimination on grounds of nationality in particular. This is particularly the case in relation to public contracts the value of which does not reach the thresholds fixed by that Directive. The mere fact that the Community legislature considered that the strict special procedures laid down in the directives on public procurement are not appropriate in the case of public contracts of small value does not mean that those contracts are excluded from the scope of Community law.

- **Contract award procedures** – Service providers - National legislation allowing the contracting authority to delegate some responsibilities – Mission of the agent reserved to certain exhaustively listed categories of legal persons under national law – Not permissible [Directive 2004/18/EC, article 2]

By reserving the task of delegated project contracting to an exhaustive list of legal persons under national law, a Member State fails to fulfil its obligations under the EU procurement Directive and under the TFEU for public service contracts outside the scope of Directive.

63. Judgment of 10 November 2005, case C-29/04, Commission/Austria

- **Scope of the directive - Contracting authorities** - “In-house”-services – Contracting authority having a holding in the capital of a company legally distinct from it. [Directive 2004/18/EC, articles 1(2)(a) and 1(9)]

By permitting the award by a municipality of a public service contract to a company which is legally distinct from that municipality and 49% owned by a private undertaking without the public tendering procedure provided for in the EU procurement Directive being implemented, a Member State fails to fulfil its obligations under that directive. Where a contracting authority intends to conclude a contract for pecuniary interest relating to services within the material scope of the Directive with a company legally distinct from it, in whose capital it has a holding together with one or more private undertakings, even as a majority, the public award procedures laid down by that directive must always be applied.

64. Judgment of 24 November 2005, case C-331/04, ATI EAC and others

- **Contract award criteria** - The economically most advantageous tender – Observance of award criteria set out in the contract documents or the contract notice – Establishment of subheadings for one of the award criteria in the contract documents or the contract notice - Decision to apply weighting - Principles of equal treatment of tenderers and transparency. [Directive 2004/18/EC, articles 2 and 53]

The EU procurement directive must be interpreted as meaning that Community law does not preclude a jury from attaching specific weight to the subheadings of an award criterion which are defined in advance, by dividing among those headings the points awarded for that criterion by the contracting authority when the contract documents or the contract notice were prepared, provided that that decision: i. does not alter the criteria for the award of the contract set out in the contract documents or the contract notice; ii. does not contain elements which, if they had been known at the time the tenders were prepared, could have affected that preparation; iii. was not adopted on the basis of matters likely to give rise to discrimination against one of the tenderers.

65. Judgment of 9 February 2006, joined cases C-226/04 and C-228/04, La Cascina and Zilch

- **Public service contracts – Procedures for the award of public service contracts – Qualitative selection** – Exclusion of candidate – Obligations of service providers – Payment of social security contributions and taxes [Directive 2004/18/EC, articles 2 and 45]

The EU procurement Directive enables Member States to exclude any candidate who ‘has not fulfilled obligations’ relating to the payment of social security contributions and taxes in accordance with national legal provisions. That provision does not preclude a national law or administrative practice according to which a service provider, who has not fulfilled obligations relating to social security contributions and taxes by having paid in full when the period prescribed for submitting the request to participate in the contract expires, may subsequently regularise his position, i. pursuant to a tax amnesty or leniency measures adopted by the State, or ii. pursuant to an administrative arrangement of payment in instalments or debt relief, or iii. by bringing administrative or legal proceedings, provided that, within the period prescribed by national law or administrative practice, he provides evidence that he has benefited from such measures or arrangement or that he has brought such proceedings within that period.

66. Judgment of 6 April 2006, Case C-410/04, Associazione Nazionale Autotrasporto Viaggiatori (ANAV)

- **Freedom to provide services – Local public transport service – Award with no call for tenders** – Award by a public authority to an undertaking of which it owns the share capital – In house? [Directive 2004/18/EC, articles 1(2), 1(9), 2 and 17]

Articles 49 and 56 TFEU, and the principles of equal treatment, non-discrimination on grounds of nationality and transparency do not preclude national legislation which allows a public authority to award a contract for the provision of a public service directly to a company of which it wholly owns the share capital, provided that the public authority exercises over that company control comparable to that exercised over its own departments and that that company carries out the essential part of its activities with the controlling authority.

67. Judgment of 11 May 2006, Case C-340/04, *Carbotermo and Consorzio Alisei*

- **Public supply contracts – Award of contract without a call for tenders** – Award of the contract to an undertaking in which the contracting authority has a shareholding – In house? – Contracting authority must exercise over the successful tenderer for the public procurement contract at issue a control similar to that which it exercises over its own departments – Undertaking must carry out the essential part of its activities with the controlling authority. [Directive 2004/18/EC, article 1(2) and 1(9)]

The EU procurement Directive precludes the direct award of a public supply and service contract, the main value of which lies in supply, to a joint stock company whose Board of Directors has ample managerial powers which it may exercise independently and whose share capital is, at present, held entirely by another joint stock company whose majority shareholder is, in turn, the contracting authority. In such circumstances, the condition relating to the inapplicability of the EU procurement Directive, namely that the contracting authority exercises over the successful tenderer for the public procurement contract at issue a control similar to that which it exercises over its own departments, is not fulfilled. In order to determine whether that condition is fulfilled, it is necessary to take account of all the legislative provisions and relevant circumstances. It must follow from that examination that the successful tenderer is subject to a control enabling the contracting authority to influence that company's decisions. It must be a case of a power of decisive influence over both strategic objectives and significant decisions. That is not the case where the control exercised by the contracting authority can be described as consisting essentially of the latitude conferred by company law on the majority of the shareholders, which places considerable limits on its power to influence the decisions of those companies. Moreover, where any influence which the contracting authority might have is through a holding company, the intervention of such an intermediary may weaken any control possibly exercised by the contracting authority over a joint stock company merely because it holds shares in that company. In order to determine whether an undertaking carries out the essential part of its activities with the controlling authority, for the purpose of deciding on the applicability of the EU procurement Directive, account must be taken of all the activities which that undertaking carries out on the basis of an award made by the contracting authority, regardless of who pays for those activities, whether it be the contracting authority itself or the user of the services provided; the territory where the activities are carried out is irrelevant.

68. Judgment of 18 January 2007, Case C-220/05, Jean Auroux and Others

- **Public procurement – Definition of "public works contract" and "work" – Method of calculation of the value of the contract** - Award without call for tenders – Contract for the implementation of a development project concluded between two contracting authorities [Directive 2004/18/EC, article 1(2), 1(9) and 9]

An agreement by which a first contracting authority entrusts a second contracting authority with the execution of a work constitutes a public works contract within the meaning of the EU procurement directive, whether or not it is anticipated that the first contracting authority is or will become the owner of all or part of that work. In order to determine the value of a contract to determine if the European thresholds have been reached, account must be taken of the total value of the works contract from the point of view of a potential tenderer, including not only the total amounts to be paid by the contracting authority but also all the revenue received from third parties. A contracting authority is not exempt from using the procedures for the award of public works contracts laid down in the EU procurement directive on the ground that, in accordance with national law, the agreement may be concluded only with certain legal persons, which themselves have the capacity of contracting authority and which will be obliged, in turn, to apply those procedures to the award of any subsequent contracts.

69. Judgment of 19 April 2007, Case C-295/05, Asociación Nacional de Empresas Forestales (Asemfo)

- **National legislation enabling a public undertaking to perform operations on the direct instructions of the public authorities without being subject to the general rules for the award of public procurement contracts** – In house – Internal management structure – Conditions – The public authority must exercise over a distinct entity a control similar to that which it exercises over its own departments – The distinct entity must carry out the essential part of its activities with the public authority or authorities which control it. [Directive 2004/18/EC, articles 1(2) and 1(9)]

The EU Procurement Directive does not preclude a body of rules which enables a public undertaking acting as an instrument and technical service of several public authorities, to execute operations without being subject to the regime laid down by those directives, since, first, the public authorities concerned exercise over that undertaking a control similar to that which they exercise over their own departments, and, second, such an undertaking carries out the essential part of its activities with those same authorities.

70. Judgment of 14 June 2007, Case C-6/05, Medipac-Kazantzidis

- **Free movement of goods - Principle of equal treatment and obligation of transparency** – Hospital purchase of medical devices bearing the CE marking – Protective measures – Public supply contract – Contract falling below the threshold of application of the EU procurement [Directive 2004/18/EC, article 2]

Regarding the applicability of the EU Procurement Directive, it is common ground that it applies only to contracts the value of which is equal to or greater than the threshold laid down in that directive. The file shows that the value of the contract at issue in the main proceedings is lower than the threshold of application laid down in the EU Procurement Directive. According to settled case-law, even if the value of a contract which is the subject-matter of an invitation to tender does not attain the threshold of application of the directives by which the Community legislature has regulated the field of public procurement, and the contract in question therefore does not fall within the scope of application of those directives, contracting authorities awarding contracts are nevertheless bound to abide by the general principles of Community law, such as the principle of equal treatment and the resulting obligation of transparency.

71. Judgment of 18 July 2007, Case C-382/05, European Commission/Italy

- **Public service contracts subject to the EU procurement Directive and not service concessions outside the scope of that directive.** [Directive 2004/18/EC, article 1(2) and 17]

Where an awarding authority of a Member State initiates the procedure for the conclusion of agreements concerning the use of that part of municipal waste produced in the municipalities of a region of that Member State remaining after the collection of selected material, and concludes those agreements without following the procedures laid down by the EU procurement Directive, and, in particular, without publishing the appropriate contract notice in the Official Journal of the European Union, that Member State fails to fulfil its obligations under that directive. The abovementioned agreements, which provide, in particular, for the payment by the awarding authority to the operator of a royalty the amount of which is fixed in euros per tonne of waste transferred by the municipalities concerned to that operator do not establish a method of remuneration consisting in the right to exploit the services in question for payment and involving the assumption by the operator of the risk connected with operating them. Such agreements must therefore be considered to be public service contracts subject to the EU procurement Directive and not service concessions outside the scope of that directive, their conclusion being possible only in accordance with the provisions of that directive.

72. Judgment of 13 September 2007, Case C-260/04, European Commission/Italy

- **Freedom of establishment and freedom to provide services – Public services concessions – Renewal of 329 horse-race betting licences without inviting competing bids – Requirements of publication and transparency – Discrimination on grounds of nationality.** [Directive 2004/18/EC, articles 2 and 17]

Public authorities concluding public service concession contracts are bound to comply with the fundamental rules of the Treaty, especially Articles 49 and 56 TFEU, and the prohibition of discrimination on grounds of nationality in particular, as being a specific expression of the general principle of equal treatment. The principles of equal treatment and non-discrimination on grounds of nationality imply, in particular, a duty of transparency which consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the service

concession to be opened up to competition and the impartiality of procurement procedures to be reviewed. It follows that a Member State which renews licences for horse-race betting operations without inviting any competing bids fails to fulfil its obligations under Articles 49 and 56 TFEU and, in particular, infringes the general principle of transparency and the obligation to ensure a sufficient degree of advertising. The renewal of such licences without putting them out to tender cannot be justified by the need to discourage the development of clandestine activities for collecting and allocating bets, since it is not an appropriate means of attaining that objective and goes beyond what is necessary in order to preclude operators in the horse-race betting sector from engaging in criminal or fraudulent activities. In addition, grounds of an economic nature, such as the need to ensure continuity, financial stability and a proper return on past investments for licence holders, cannot be accepted as overriding reasons in the general interest justifying a restriction of a fundamental freedom guaranteed by the Treaty.

73. Judgment of 13 November 2007, Case C-507/03, European Commission/Ireland

- **Award of public contracts – Common market fundamental freedoms.** [Directive 2004/18/EC, articles 2 and 21]

For the services coming within the ambit of Annex II B to EU Procurement Directive, and subject to a subsequent evaluation as referred to in Article 43 of that directive, the Community legislature based itself on the assumption that contracts for such services are not, in the light of their specific nature, of cross-border interest such as to justify their award being subject to the conclusion of a tendering procedure intended to enable undertakings from other Member States to examine the contract notice and submit a tender. For that reason, Directive 92/50 merely imposes a requirement of publicity after the fact for that category of services. The award of public contracts beneath the thresholds of the EU procurement Directive remains subject to the fundamental rules of Community law, and in particular to the principles laid down by the Treaty on the right of establishment and the freedom to provide services. It follows that the advertising arrangement introduced by the EU procurement Directive for contracts relating to services coming within the ambit of Annex II B cannot be interpreted as precluding application of the principles resulting from Articles 49 and 56 TFEU, in the event that such contracts nevertheless are of certain cross-border interest.

74. Judgment of 13 December 2007, Case C-337/06, Bayerischer Rundfunk

- **Public service contracts – Contracting authorities – Bodies governed by public law – Condition that the activity of the institution be ‘financed, for the most part, by the State’.** [Directive 2004/18/EC, article 1(9)]

The first condition of the third indent of the second subparagraph of Article 1(9) of the EU procurement Directive must be interpreted as meaning that there is financing, for the most part, by the State when the activities of public broadcasting bodies such as those in the main proceedings are financed for the most part by a fee payable by persons who possess a receiver, which is imposed, calculated and levied according to rules such as those in the main

proceedings. The first condition of the third indent of the second subparagraph of Article 1(9) of the EU procurement Directive must be interpreted as meaning that, if the activities of public broadcasting bodies such as those in the main proceedings are financed according to the procedures set out when examining the first question, the condition of ‘financing ... by the State’ does not require that there be direct interference by the State or by other public authorities in the awarding, by such bodies, of a contract such as that at issue in the main proceedings.

75. Judgment of 18 December 2007, Case C-532/03, European Commission/Ireland

- **Public procurement – Common market fundamental freedoms** – Emergency ambulance services [Articles 49 and 56 TFEU]

Without prejudice to the obligation of the Member States to facilitate the achievement of the Commission’s tasks, which consist in particular in ensuring that the provisions of the Treaty and the measures taken by the institutions pursuant thereto are applied, in an action for failure to fulfil obligations it is incumbent upon the Commission to prove the allegation that the obligation has not been fulfilled. It is the Commission’s responsibility to place before the Court the information needed to enable the Court to establish that the obligation has not been fulfilled, and in so doing the Commission may not rely on any presumption. Thus, in an action for a declaration that for one public body, without prior advertising, to provide another with emergency ambulance services is contrary to freedom of establishment and the freedom to provide services, it is for the Commission to place before the Court the information needed to enable the Court to establish that a public contract has been awarded, given that the possibility that the public body concerned provides the services in question in the exercise of its own powers cannot be excluded. In that regard, the mere fact that, as between two public bodies, funding arrangements exist in respect of emergency ambulance services does not imply that the provision of the services concerned constitutes an award of a public contract which would need to be assessed in the light of the fundamental rules of the Treaty.

76. Judgment of 18 December 2007, Case C-357/06, Frigerio Luigi

- **Economic operators** – National provisions which exclude candidates or tenderers from submitting a tender solely on the ground that those candidates or tenderers do not have a legal form corresponding to a specific category of legal persons. [Directive 2004/18/EC, article 4]

The EU procurement Directive precludes national provisions, such as those at issue in the main proceedings, which exclude candidates or tenderers entitled under the law of the Member State concerned to provide the service in question, including those composed of groups of service providers, from submitting a tender, in a procedure for the award of a public service contract with a value greater than the threshold for application of the EU procurement Directive, solely on the ground that those candidates or tenderers do not have a legal form corresponding to a specific category of legal persons, namely that of a company with share capital. It is for the national court, to the full extent of its discretion under national law, to interpret and apply

national law in accordance with the requirements of Community law and, in so far as such an interpretation is not possible, to disapply any provision of national law which is contrary to those requirements.

77. Judgment of 24 January 2008, Case C-532/06, Lianakis

- **Criteria which may be accepted as ‘criteria for qualitative selection’ or ‘award criteria’ - Principle of equal treatment of economic operators and obligation of transparency – Economically most advantageous tender – Compliance with the award criteria set out in the contract documents or contract notice – Subsequent determination of weighting factors and sub-criteria in respect of the award criteria referred to in the contract documents or contract notice [Directive 2004/18/EC, articles 2, 44 and 53]**

In a tendering procedure, a contracting authority is precluded from taking into account as ‘award criteria’ rather than as ‘qualitative selection criteria’ the tenderers’ experience, manpower and equipment and their ability to perform the contract by the anticipated deadline. While the EU procurement directive does not in theory preclude the examination of the tenderers’ suitability and the award of the contract from taking place simultaneously, the two procedures are nevertheless distinct and are governed by different rules. The suitability of tenderers is to be checked in accordance with the criteria of economic and financial standing and of technical capability referred to in the EU procurement directive, whereas the award of contracts is to be based on the criteria set out in EU procurement directive, namely, the lowest price or the economically most advantageous tender. Read in the light of the principle of equal treatment of economic operators and the ensuing obligation of transparency, the EU procurement directive precludes the contracting authority in a tendering procedure from stipulating at a later date the weighting factors and sub-criteria to be applied to the award criteria referred to in the contract documents or contract notice. The EU procurement directive requires that potential tenderers should be aware of all the elements to be taken into account by the contracting authority in identifying the economically most advantageous offer, and their relative importance, when they prepare their tenders. Therefore, a contracting authority cannot apply weighting rules or sub-criteria in respect of the award criteria which it has not previously brought to the tenderers’ attention.

78. Judgment of 21 February 2008, case C-412/04, European Commission/Italy

- **Public works, supply and service contracts – Transparency – Equal treatment – Contracts excluded from the scope of those directives on account of their value – Determination according to the main purpose of the contract – Mixed works, supply and service contracts – Supply or service contracts including ancillary works. [Directive 2004/18/EC, articles 1(2), 2 and 9(5)]**

A Member State which makes mixed works, supply and service contracts and supply or service contracts which include ancillary works if the works represent more than 50% of the total value of the relevant contract subject to the national rules on public works contracts fails to fulfill its

obligations under the EU Procurement Directive. Where a contract contains both elements relating to a public works contract and elements relating to another type of contract, it is the main purpose of the contract that determines which articles of the EU Procurement Directive Community are to be applied in principle. The Community legislature expressly made a policy choice to exclude contracts under a certain threshold from the advertising regime which it introduced and therefore did not impose any specific obligation with respect to them. Where it is established that such a contract is of certain cross-border interest, the award, in the absence of any transparency, of that contract to an undertaking located in the same Member State as the contracting authority amounts to a difference in treatment to the detriment of undertakings which might be interested in the contract but which are located in other Member States. Unless it is justified by objective circumstances, such a difference in treatment, which, by excluding all undertakings located in another Member State, operates mainly to the detriment of the latter undertakings, amounts to indirect discrimination on the basis of nationality, prohibited under Articles 49 and 56 TFEU.

79. Judgment of 3 April 2008, case C-346/06, Dirk Rüffert

- **Freedom to provide services** – Restrictions – Posting of workers in the context of the provision of services – Procedures for the award of public works contracts – Social protection of workers. [Article 56 TFEU]

A Member State is not entitled to impose on undertakings established in other Member States, a rate of pay provided for by a collective agreement in force at the place where the services concerned are performed and not declared to be of general application, by requiring, by a measure of a legislative nature, the contracting authority to designate as contractors for public works contracts only contractors which, when submitting their tenders, agree in writing to pay their employees, in return for performance of the services concerned, at least the wage provided for in the collective agreement.

80. Judgment of 8 April 2008, case C-337/05, European Commission/Italy

Public supply contracts – Award of public contracts without prior publication of a notice – Absence of competitive tendering – Agusta and Agusta Bell helicopters. [Directive 2004/18/EC, articles 10, 14 and 31]

The negotiated procedure is exceptional in nature and may be applied only in cases which are set out in an exhaustive list. To that end, the EU Procurement Directive exhaustively and expressly lists the only exceptions for which recourse to the negotiated procedure is allowed. Derogations from the rules intended to ensure the effectiveness of the rights conferred by the Treaty in connection with public contracts must be interpreted strictly. To prevent the EU Procurement Directive being deprived of its effectiveness, the Member States cannot, therefore, provide for the use of the negotiated procedure in cases not provided for by that directive, or add new conditions to the cases expressly provided for by the directive in question which make that procedure easier to use. In addition, the burden of proving the existence of exceptional

circumstances justifying the derogation from those rules lies on the person seeking to rely on those circumstances. As regards the legitimate requirements of national interest foreseen in Article 346 TFEU and Article 14 of the EU Procurement Directive, any Member State may take such measures as it considers necessary for the protection of the essential interests of its security and which are connected with the production of or trade in arms, munitions and war materials, provided, however, that such measures do not alter the conditions of competition in the common market regarding products which are not intended for specifically military purposes. Therefore, the purchase of equipment, the use of which for military purposes is hardly certain, must necessarily comply with the rules governing the award of public contracts. The supply of helicopters to military corps for the purpose of civilian use must comply with those same rules.

81. Judgment of 10 April 2008, case C-393/06, Ing. Aigner

- **Body governed by public law – Contracting authority** - Contracting entity pursuing activities falling in part within the field of application of Directive 2004/17/EC and in part within that of Directive 2004/18/EC. [Directive 2004/18/EC, articles 1(2), 1(9) and 2]

A 'body governed by public law' is any body which, first, was established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, secondly, has legal personality and, thirdly, is financed, for the most part, by the State, regional or local authorities, or other bodies governed by public law, or subject to management supervision by those bodies, or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law. Those three conditions are cumulative. An entity established specifically for the purpose of supplying district heating to homes, public institutions, offices, undertakings in a local authority area by means of the use of energy produced by the destruction of waste, which has legal personality and of which the local authority wholly owns the share capital and monitors its economic and financial management, meets the two latter conditions laid down by those directives. With regard to the first condition, it cannot be disputed that such an entity was established specifically to meet needs in the general interest. To provide heating for an urban area by means of an environmentally-friendly process constitutes an aim which is undeniably in the general interest. In order to ascertain whether the needs met by the entity in question have a character other than industrial or commercial, account must be taken of all the relevant law and facts such as the circumstances prevailing at the time when the entity concerned was established and the conditions under which it exercises its activity. In that regard, it is common ground that the pursuit of profit did not underlie its establishment. With regard, subsequently, to the relevant market which must be considered in order to ascertain whether the entity in question is exercising its activities in competitive conditions, account must be taken, having regard to the functional interpretation of the concept of a 'body governed by public law', of the sector for which that entity was created, that is to say, the supply of district heating by means of the use of energy produced by the burning of waste. All contracts awarded by an entity which is a body governed by public law, within the meaning of Directive 2004/17 or Directive 2004/18, which relate to activities carried out by that entity in one or more of the sectors listed in Articles 3 to 7 of Directive 2004/17 must be subject to the procedures laid down in that directive.

However, all other contracts awarded by such an entity in connection with the exercise of other activities are covered by the procedures laid down in Directive 2004/18. Each of these two directives applies without distinction between the activities carried out by that entity to accomplish its task of meeting needs in the general interest and activities which it carries out under competitive conditions, and even where there is an accounting system intended to make a clear internal separation between those activities in order to avoid cross financing between those sectors.

82. Judgment of 15 May 2008, joined cases C-147/06 and C-148/06, SECAP and Santorso

- **Community law – Principles – Equal treatment – Discrimination on grounds of nationality –** Contracts with a value below the threshold set by the EU Procurement Directive, which are of certain cross-border interest. [Directive 2004/18/EC, articles 2 and 55]

The fundamental rules of the Treaty on freedom of establishment and freedom to provide services and the general principle of non-discrimination preclude national legislation which, with regard to contracts with a value below the threshold set by the EU Procurement Directive, which are of certain cross-border interest, imposes an absolute duty on the contracting authorities, where the number of valid tenders is greater than five, automatically to exclude tenders considered to be abnormally low in relation to the goods, works or services according to a mathematical criterion laid down by that legislation without allowing those contracting authorities any possibility of verifying the constituent elements of those tenders by requesting the tenderers concerned to provide details of those elements. That would not be the case if national or local legislation or even the contracting authorities concerned were to set a reasonable threshold above which abnormally low tenders were automatically excluded on account of there being an unduly large number of tenders, which might oblige the contracting authorities to examine on an inter partes basis such a high number of bids that it would exceed their administrative capacity or might, due to the delay which such an examination would entail, jeopardise the implementation of the project.

83. Judgment of 19 June 2008, C-454/06, presstext Nachrichtenagentur

- **Procedures for the award of public service contracts – Award of a contract – Meaning –** Amendments to the provisions of a public contract during the currency of the contract. [Directive 2004/18/EC, article 28]

The terms ‘awarding’ and ‘awarded’, used in the EU procurement Directive must be interpreted as not covering a situation where services supplied to the contracting authority by the initial service provider are transferred to another service provider established as a limited liability company, the sole shareholder of which is the initial service provider, controlling the new service provider and giving it instructions, provided that the initial service provider continues to assume responsibility for compliance with the contractual obligations. Amendments to the provisions of a public contract during the currency of the contract constitute a new award of a contract within the meaning of the EU procurement Directive when they are materially different in character

from the original contract and, therefore, such as to demonstrate the intention of the parties to renegotiate the essential terms of that contract. An amendment to a public contract during its currency may be regarded as being material when it introduces conditions which, had they been part of the initial award procedure, would have allowed for the admission of tenderers other than those initially admitted.

84. Judgment of 17 July 2008, C-347/06, ASM Brescia

- **Common market fundamental freedoms** – Concession for a public gas distribution service – Early cessation at the end of a transitional period – Public service concession granted without a competitive tendering procedure – Principles of the protection of legitimate expectations and legal certainty. [Directive 2004/18/EC, article 2]

Articles 49 and 56 TFEU do not preclude legislation of a Member State to implement the common rules for the internal market in natural gas by means of the early cessation, at the end of a transitional period, of concessions for the distribution of natural gas granted without a competitive tendering procedure, from providing for the extension, on certain conditions, of the length of that transitional period, provided that such an extension can be regarded as being necessary to enable the contracting parties to untie their contractual relations on acceptable terms both from the point of view of the requirements of the public service and from the economic point of view. Notwithstanding the fact that such a public service concession is outside the scope of the directives on the different categories of public contracts, public authorities are nonetheless bound, when they envisage granting such a concession, to comply with the fundamental rules of the Treaty, in general, and the principle of non-discrimination on the grounds of nationality, in particular. More particularly, since such a concession is of a certain cross-border interest, its award, in the absence of any transparency, to an undertaking located in the Member State to which the contracting authority belongs, amounts to a difference in treatment to the detriment of undertakings which might be interested in that concession but which are located in other Member States. Unless it is justified by objective circumstances, such a difference in treatment, which, by excluding all undertakings located in another Member State, operates mainly to the detriment of the latter undertakings, amounts to indirect discrimination on the basis of nationality, prohibited under Articles 49 and 56 TFEU. Such a difference in treatment can however be justified by the necessity of complying with the principle of legal certainty, which forms part of the Community legal order and is binding on every national authority responsible for implementing Community law. Since Directive 2003/55 concerning common rules for the internal market in natural gas and repealing Directive 98/30 requires existing concessions for the distribution of gas to be called in question only in cases of long-standing concessions not expiring for decades which were granted at a time when the Court had not yet held that contracts with a cross-border interest might be subject to duties of transparency arising from primary law, the principle of legal certainty, which requires, particularly, that rules of law be clear, precise and predictable in their effects, not only permits but also requires that the termination of such a concession be coupled with a transitional period which enables the contracting parties to untie their contractual relations on acceptable terms both from the point of view of the requirements of the public service and from the economic point of view.

85. Judgment of 2 October 2008, case C-157/06, European Commission/Italy

- **Procedures for the award of public supply contracts** – Light helicopters for the police and the national fire service – Award of public contracts without prior publication of a notice – Derogations from common rules – Restrictive interpretation – Protection of the essential interests of a Member State's security. [Directive 2004/18/EC, articles 10, 14 and 31]

A Member State has failed to fulfil its obligations under the EU procurement Directive, where it has adopted national legislation authorising a derogation from the Community rules on public supply contracts in respect of the purchase of light helicopters for the use of police forces and the national fire service, without any of the conditions capable of justifying that derogation having been satisfied. As regards the legitimate requirements of national interest foreseen by Article 346 TFEU, any Member State may take such measures as it considers necessary for the protection of the essential interests of its security and which are connected with the production of or trade in arms, munitions and war materials, provided, however, that such measures do not alter the conditions of competition in the common market regarding products which are not intended for specifically military purposes. It is clear from the wording of that provision that the products in question must be intended for specifically military purposes. It follows that the purchase of equipment, the use of which for military purposes is hardly certain, must necessarily comply with the rules governing the award of public contracts. Since it is not disputed that the national legislation applies to helicopters which are clearly for civilian use whereas their military use is only potential, Article 346 TFEU, to which Article 10 of the EU procurement Directive refers, cannot properly be invoked by the Member State concerned to justify national legislation authorising recourse to the negotiated procedure for the purchase of those helicopters. Furthermore, resort to Article 10 of the EU procurement Directive in respect of the purchase of the helicopters in question appears disproportionate as regards the objective of preventing the disclosure of sensitive information relating to their production in so far as the Member State concerned has not shown that such an objective was unattainable within a competitive tendering procedure such as that specified by that directive. It follows that the mere fact of stating that the supplies at issue are declared secret, that they are accompanied by special security measures or that it is necessary to exclude them from the Community rules in order to protect the essential interests of State security cannot suffice to prove that the exceptional circumstances justifying the derogations provided for in Article 10 of the EU procurement Directive actually exist.

86. Judgment of 13 November 2008, case C-324/07, Coditel Brabant

- **Public procurement – Tendering procedures – Public service concessions** – Concession for the operation of a municipal cable television network – Awarded by a municipality to an inter-municipal cooperative society – Obligation of transparency – Conditions – Whether the control exercised by the concession-granting authority over the concessionaire is similar to that exercised over its own departments. [Directive 2004/18/EC, articles 2 and 17]

Articles 49 and 56 TFEU, the principles of equal treatment and of non-discrimination on grounds of nationality and the concomitant obligation of transparency do not preclude a public authority from awarding, without calling for competition, a public service concession to an inter-municipal cooperative society of which all the members are public authorities, where those public authorities exercise over that cooperative society control similar to that exercised over their own departments and where that society carries out the essential part of its activities with those public authorities. Subject to verification of the facts by the referring court as regards the degree of independence enjoyed by the inter-municipal cooperative society in question, in circumstances such as those of the case before the referring court, where decisions regarding the activities of an inter-municipal cooperative society owned exclusively by public authorities are taken by bodies, created under the statutes of that society, which are composed of representatives of the affiliated public authorities, the control exercised over those decisions by the public authorities may be regarded as enabling those authorities to exercise over the cooperative society control similar to that exercised over their own departments. Where a public authority joins an inter-communal cooperative of which all the members are public authorities in order to transfer to that cooperative society the management of a public service, it is possible, in order for the control which those member authorities exercise over the cooperative to be regarded as similar to that which they exercise over their own departments, for it to be exercised jointly by those authorities, decisions being taken by a majority, as the case may be.

87. Judgment of 16 December 2008, case C-213/07, *Michaniki*

- **Public works contracts** – Grounds for excluding participation in a contract – National measures establishing an incompatibility between the public works sector and that of the media. [Directive 2004/18/EC, articles 2 and 45 to 52]

The EU procurement Directive must be interpreted as listing exhaustively the grounds based on objective considerations of professional quality which are capable of justifying the exclusion of a contractor from participation in a public works contract. However, that directive does not preclude a Member State from providing for further exclusionary measures designed to ensure observance of the principles of equal treatment of tenderers and of transparency, provided that such measures do not go beyond what is necessary to achieve that objective. Community law must be interpreted as precluding a national provision which, whilst pursuing the legitimate objectives of equal treatment of tenderers and of transparency in procedures for the award of public contracts, establishes an irrebuttable presumption that the status of owner, partner, main shareholder or management executive of an undertaking active in the media sector is incompatible with that of owner, partner, main shareholder or management executive of an undertaking which contracts with the State or a legal person in the public sector in the broad sense to perform a works, supply or services contract.

88. Judgment of 19 May 2009, case C-538/07, Assitur

- **Public service contracts** – National legislation not allowing companies linked by a relationship of control or significant influence to participate, as competing tenderers, in the same procedure for the award of a public contract [Directive 2004/18/EC, articles 2 and 45]

The public procurement directive must be interpreted as not precluding a Member State from laying down, in addition to the grounds for exclusion contained in that provision, other grounds for exclusion intended to guarantee respect for the principles of equality of treatment and transparency, provided that such measures do not go beyond what is necessary to achieve that objective. Community law precludes a national provision which, while pursuing legitimate objectives of equality of treatment of tenderers and transparency in procedures for the award of public contracts, lays down an absolute prohibition on simultaneous and competing participation in the same tendering procedure by undertakings linked by a relationship of control or affiliated to one another, without allowing them an opportunity to demonstrate that that relationship did not influence their conduct in the course of that tendering procedure.

89. Judgment of 9 June 2009, case C-480/06, European Commission/Germany

- **Contracting authorities** - No formal European tendering procedure for the award of waste treatment services – Cooperation between local authorities [Directive 2004/18/EC, article 1(9)]

It must be observed, first, that Community law does not require public authorities to use any particular legal form in order to carry out jointly their public service tasks. Secondly, such cooperation between public authorities does not undermine the principal objective of the Community rules on public procurement, that is, the free movement of services and the opening-up of undistorted competition in all the Member States, where implementation of that cooperation is governed solely by considerations and requirements relating to the pursuit of objectives in the public interest and the principle of equal treatment of the persons concerned, referred to in the public procurement directive, is respected, so that no private undertaking is placed in a position of advantage vis-à-vis competitors.

90. Judgment of 11 June 2009, case C-300/07, Hans & Christophorus Oymanns

- **Public supply contracts and public service contracts – Bodies governed by public law – Contracting authorities** – Invitation to tender – Statutory sickness insurance funds – Manufacture and supply of orthopaedic footwear individually tailored to patients' needs – Detailed advice provided to patients [Directive 2004/18/EC, article 1(2) and 1(9)]

The public procurement directive must be interpreted as meaning that there is financing, for the most part, by the State when the activities of statutory sickness insurance funds are chiefly financed by contributions payable by members, which are imposed, calculated and collected

according to rules of public law such as those in the main proceedings. Such sickness insurance funds are to be regarded as bodies governed by public law and therefore as contracting authorities for the purposes of the application of the rules in that directive. When a mixed public contract concerns both products and services, the criterion to be applied in order to determine whether the contract in question is a supply contract or a service contract is the respective value of the products and services covered by the contract. Where the products supplied are individually manufactured and tailored to the needs of each customer and where each customer must receive individual advice on the use of the products, the manufacture of those products must be classified in the 'supply' part of the said contract for the purposes of calculating the value of each part thereof.

91. Judgment of 10 September 2009, case C-573/07, Sea

- **Public procurement – Award procedures** – Contract relating to a service for the collection, transport and disposal of urban waste – Awarded without any call for tenders – Awarded to a company limited by shares whose capital is wholly owned by public bodies but under whose statutes a private capital holding is possible

It is not contrary to Articles 49 and 56 TFEU, the principles of equal treatment and of non-discrimination on grounds of nationality or the obligation of transparency arising therefrom for a public service contract to be awarded directly to a company limited by shares with wholly public capital so long as the public authority which is the contracting authority exercises over that company control similar to that which it exercises over its own departments and so long as the company carries out the essential part of its activities with the authority or authorities controlling it. Without prejudice to the determination by the court making the reference of the effectiveness of the relevant provisions of the statutes, the control exercised over that company by the shareholder authorities may be regarded as similar to that which they exercise over their own departments in circumstances such as those of the case in the main proceedings, when: i. that company's activity is limited to the territory of those authorities and is carried on essentially for their benefit, and ii. through the bodies established under the company's statutes made up of representatives of those authorities, the latter exercise conclusive influence on both the strategic objectives of the company and on its significant decisions.

92. Judgment of 10 September 2009, case C-206/08, Eurawasser

- **Procurement procedures of entities operating in the water, energy, transport and postal services sectors – Service concession** – Definition – Public service for the distribution of drinking water and the treatment of sewage – Transfer to the supplier of the risk connected with operating the service in question [Directive 2004/18/EC, article 17]

In relation to a contract for the supply of services, the fact that the supplier does not receive consideration directly from the contracting authority, but is entitled to collect payment under private law from third parties, is sufficient for the contract in question to be categorised as a 'service concession' within the meaning of the public procurement directive, where the supplier

assumes all, or at least a significant share, of the operating risk faced by the contracting authority, even if that risk is, from the outset, very limited on account of the detailed rules of public law governing that service.

93. Judgment of 15 October 2009, case C-196/08, Acoset

- **Award of public contracts – Award of water service to a semi-private company – Competitive procedure** – Appointment of the private partner responsible for operating the service – Award made without regard to the rules governing the award of public contracts [Articles 49 and 56 TFEU]

Articles 49 and 56 TFEU do not preclude the direct award of a public service which entails the prior execution of certain works, such as that at issue in the main proceedings, to a semi-public company formed specifically for the purpose of providing that service and possessing a single corporate purpose, the private participant in the company being selected by means of a public and open procedure after verification of the financial, technical, operational and management requirements specific to the service to be performed and of the characteristics of the tender with regard to the service to be delivered, provided that the tendering procedure in question is consistent with the principles of free competition, transparency and equal treatment laid down by the EC Treaty with regard to concessions.

94. Judgment of 15 October 2009, case C-138/08, Hochtief and Linde

- **Procedures for the award of public works contracts – Negotiated procedures with publication of a contract notice** – Obligation to admit a minimum number of suitable candidates – Obligation to ensure genuine competition

The public procurement directive must be interpreted as meaning that where a contract is awarded by a negotiated procedure and the number of suitable candidates is below the lower limit prescribed for the procedure in question, the contracting authority may, nevertheless, continue with the procedure by inviting the suitable candidate or candidates to negotiate the terms of that contract. The public procurement directive must be interpreted as meaning that the obligation to ensure that there is genuine competition is satisfied where the contracting authority has recourse to the negotiated procedure under the conditions referred to in that directive.

95. Judgment of 12 November 2009, case C-199/07, Commission/Greece

- **Contract notice – Qualitative selection and award criteria** – Consultancy project – Criteria for automatic exclusion

Greece has failed to fulfil its obligations under the public procurement directive by reason, firstly, of the exclusion, by virtue of a contract notice, of foreign consultancy firms or consultants who

had submitted an expression of interest in the tendering procedures in the six months preceding the date of their expression of interest in the current competition and who had declared qualifications corresponding to certificate categories different from those now required and, secondly, of the failure to distinguish in that notice between qualitative selection criteria and award criteria for the contract in question.

96. Judgment of 10 December 2009, case C-299/08, Commission/France

- **Procedures for the award of public contracts** – National legislation providing for a single procedure for the award of the contract defining needs and of the ensuing marché d'exécution – Compatibility with that directive? No

By adopting and keeping in force national provisions, in as much as those provisions lay down a procedure for the award of marchés de définition (public contracts for designing the parameters, including the purpose, of a public works, supply or service contract) under which it is possible for the contracting authority to award a marché d'exécution (a public works, supply or service contract) to one of the holders of the initial marchés de définition by opening it to competition limited to those holders, the French Republic has failed to fulfil its obligations under the public procurement directive.

97. Judgment of 23 December 2009, case C-305/08, CoNISMa

- **Public service contracts – Concepts of 'contractor', 'supplier' and 'service provider' – Concept of 'economic operator'** – Universities and research institutes – Group ('consorzio') of universities and public authorities – Where the primary object under the statutes is non-profit-making – Admission to a procedure for the award of a public contract. [Directive 2004/18/EC, articles 1(8) and 4]

The provisions of the public procurement directive, which refer to the concept of 'economic operator', must be interpreted as permitting entities which are primarily non-profitmaking and do not have the organisational structure of an undertaking or a regular presence on the market – such as universities and research institutes and consortia made up of universities and public authorities – to take part in a public tendering procedure for the award of a service contract. The public procurement directive must be construed as precluding an interpretation of national legislation, such as that at issue in the main proceedings, which prohibits entities, such as universities and research institutes, which are primarily non-profit-making from taking part in a procedure for the award of a public contract, even though such entities are entitled under national law to offer the services covered by the contract in question.

98. Judgment of 23 December 2009, case C-376/08, Serrantoni and Consorzio stabile edili

- **Public works contracts –Principle of equal treatment – Groups of undertakings–** Prohibition on competing participation in the same tendering procedure by a ‘consorzio stabile’ (‘permanent consortium’) and one of its member companies). [Directive 2004/18/EC, articles 2 and 4]

Community law must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which provides that, when a public contract is being awarded, with a value below the threshold laid down in the public procurement directive, but of certain cross-border interest, both a permanent consortium and its member companies are automatically excluded from participating in that procedure and face criminal sanctions where those companies have submitted tenders in competition with the consortium’s tender in the context of the same procedure, even if the consortium’s tender was not submitted on behalf and in the interests of those companies.

99. Judgment of 25 March 2010, Case C-451/08, Helmut Müller

- Procedures for the **award of public works contracts** — Public works contracts — Concept — Sale by a public body of land on which the purchaser intends subsequently to carry out works — Works corresponding to a municipal authority’s urban-planning objectives

The concept of ‘public works contracts’ does not require the works that are the subject of the contract to be materially or physically carried out for the contracting authority, provided that they are carried out for that authority’s immediate economic benefit. The latter condition is not satisfied through the exercise by that contracting authority of regulatory urban-planning powers. ‘Public contracts’ are contracts for pecuniary interest concluded in writing. The pecuniary nature of the contract means that the contracting authority that has concluded a public works contract receives a service pursuant to that contract in return for consideration. That service consists in the realisation of works from which the contracting authority intends to benefit. In that regard, the concept of ‘public works contracts’ requires the works that are the subject of the contract to be carried out for the contracting authority’s immediate economic benefit; it is not, however, necessary that the service should take the form of the acquisition of a material or physical object. However, it is not the purpose of the mere exercise of urban-planning powers, intended to give effect to the public interest, to obtain a contractual service or immediate economic benefit for the contracting authority, as is required by the procurement directive. The concept of ‘public works contracts’ requires the contractor to assume a direct or indirect obligation to carry out the works that are the subject of the contract and that obligation to be legally enforceable in accordance with the procedural rules laid down by national law. With regard to a contract for pecuniary interest, a public works contract is based on the premise that the contractor undertakes to carry out the service that is the subject of the contract in return for consideration. Since the obligations under the contract are legally binding, their execution must be legally enforceable. In the absence of rules provided for under European Union law, and in accordance with the principle of procedural autonomy, the detailed rules governing implementation of those obligations are a matter for national law. The ‘requirements specified by the contracting

authority', within the meaning of the procurement directive cannot consist in the mere fact that a public authority examines certain building plans submitted to it or takes a decision in the exercise of its regulatory urban-planning powers. In order for it to be possible to establish that a contracting authority has specified its requirements within the meaning of that provision, the authority must have taken measures to define the type of the work or, at the very least, have had a decisive influence on its design. In a situation in which a public authority sells land on which the purchaser was subsequently to carry out works corresponding to the urban-planning objectives of a local authority, there is no public works concession within the meaning of the procurement directive. In order for a contracting authority to be able to transfer to the other contracting party the right to exploit a work within the terms of that provision, that contracting authority must be in a position to exploit that work. That will normally not be the case where the only basis for the right of exploitation is the right of ownership of the economic operator concerned. The owner of land has the right to exploit that land in compliance with the applicable statutory rules. As long as an economic operator enjoys the right to exploit the land which he owns, it is in principle impossible for a public authority to grant a concession relating to that exploitation. In addition, the essential characteristic of the concession is that it is the concessionaire himself who bears the main, or at least the substantial, operating risk. In that regard, the concessionaire's uncertainty as to whether the urban-planning service of the local authority concerned will, or will not, approve its plans is linked to the contracting authority's regulatory powers in respect of urban planning and not to the contractual relationship arising from a concession. Consequently, the risk is not linked to exploitation. In any event, with regard to the duration of concessions, there are serious grounds, including the need to guarantee competition, for holding the grant of concessions of unlimited duration to be contrary to the European Union legal order. The provisions of the procurement directive do not apply to a situation in which one public authority sells land to an undertaking, even though another public authority intends to award a works contract in respect of that land but has not yet formally decided to award that contract and neither of the public authorities nor the undertaking concerned has assumed any legally binding contractual obligations in that regard. Even if it is prudent not to exclude from the outset the application of the procurement directive to a two-phase award procedure in the form of the sale of land which will subsequently form the subject of a works contract, by considering those transactions as a unity, the mere intentions to award a contract do not however constitute binding obligations and cannot in any way satisfy the requirement of a written contract which is inherent in the very concept of a public contract as defined in the procurement directive.

100. Judgment of 13 April 2010, Case C-91/08, Wall AG

- **Service concessions** — Award procedure — Obligation of transparency — Subsequent replacement of a subcontractor

Where amendments to the provisions of a service concession contract are materially different in character from those on the basis of which the original concession contract was awarded, and are therefore such as to demonstrate the intention of the parties to renegotiate the essential terms of the contract, all necessary measures must be taken, in accordance with the national legal system of the Member State concerned, to restore the transparency of the procedure, which

may extend to a new award procedure. If need be, a new award procedure should be organised in a manner appropriate to the specific features of the service concession involved, and should ensure that an undertaking located in another Member State has access to sufficient information on that concession before it is awarded. An amendment to a service concession contract during its currency may be regarded as substantial if it introduces conditions which, if they had been part of the original award procedure, would have allowed for the admission of tenderers other than those originally admitted or would have allowed for the acceptance of an offer other than that originally accepted. A change of subcontractor, even if the possibility of a change is provided for in the contract, may in exceptional cases constitute such an amendment to one of the essential provisions of a concession contract where the use of one subcontractor rather than another was, in view of the particular characteristics of the services concerned, a decisive factor in concluding the contract, which is in any event for the referring court to ascertain.

101. Judgment of 22 April 2010, Case C-423/07, European Commission v. Spain (Public works concession for motorways)

- **Public works concession contracts** — Obligations regarding advertising — Extent of the obligations — Contract notice — Description of the object of the concession and of the location of the works — Additional works not expressly set out in the contract notice or in the tender specifications — Principle of equal treatment.

A Member State fails to fulfil its obligations under the procurement directive when, after commencing a procedure with a view to the award of a public works concession for the construction, maintenance and operation of certain sections of motorways, it awards additional works, in particular the construction of additional traffic lanes and of a new tunnel on certain sections of motorways, without those works being included in the object of the contract for a public works concession, as described in the notice published in the *Official Journal of the European Communities* and in the tender specifications. The object of the concession must be defined in the notice and in the tender specifications, which must contain the main object and additional objects of the contract, a description of the object of the concession and of the location of the works referred to in the concession, and the quantity and overall scope thereof. Even though it is acceptable for the concession-granting authority, having regard to possible particular features of the works which are the object of the concession, to leave some latitude to tenderers' initiative in the formulation of their tenders, a reference in the tender specifications to the national rules concerning the possibility that tenderers may submit variants of their tenders is unlawful if the minimum conditions which those variants were to meet are not specified in the tender specifications. Furthermore, it does not satisfy the procurement directive when, without any transparency, a public works concession contract is awarded which includes works referred to as 'additional' which of themselves constitute 'public works contracts' within the meaning of that directive and the value of which exceeds the threshold laid down therein. If the opposite were true, that would mean that those works referred to as 'additional' would avoid the advertising obligation and, consequently, any call for competition. Moreover, the fact that a concessionaire does not itself carry out the additional works, but awards them to third-party undertakings, in accordance with the requirements of publicity laid down in the procurement directive, does not exempt the concession-granting authority from its own obligations, Article 3

of that directive clearly requiring both the concession-granting authority and the concessionaire to comply with cumulative and not alternative advertising obligations.

102. Judgment of 6 May 2010, Joined Cases C-145/08 and C-149/08, Club Hotel Loutraki

- **Public service contracts — Service concessions — Mixed contract** — Contract including the transfer of a block of shares in a public casino business — Contract under which the contracting authority entrusts to the contracting undertaking the management of a casino business and the execution of a development plan consisting in upgrading the casino premises and improving the surrounding area.

A mixed contract of which the main object is the acquisition by an undertaking of 49% of the capital of a public undertaking and the ancillary object, indivisibly linked with that main object, is the supply of services and the performance of works does not, as a whole, fall within the scope of the directives on public contracts. In the case of a mixed contract, the different aspects of which are inseparably linked and thus form an indivisible whole, the transaction at issue must be examined as a whole for the purposes of its legal classification and must be assessed on the basis of the rules that govern the aspect which constitutes the main object or predominant feature of the contract. That conclusion is valid irrespective of whether or not the aspect constituting the main object of a mixed contract falls within the scope of the directives on public contracts. The transfer of shares to a tenderer in the context of a privatisation of a public undertaking does not fall within the scope of the directives on public contracts.

103. Judgment of 15 July 2010, Case C-74/09, *Bâtiments et Ponts Construction*

- **Public works contracts — Grounds for exclusion** — Obligations relating to the payment of social security contributions and taxes — Tenderers' registration obligation, on pain of exclusion — 'Registration Committee' and its powers — Examination of the validity of certificates issued by the competent authorities of the Member State in which a foreign tenderer is established.

The law of the Union is to be interpreted as not precluding national legislation which imposes on a contractor established in another Member State, in order to be awarded a contract in the contracting authority's Member State, an obligation to hold a registration, in the latter Member State, certifying that none of the grounds for exclusion listed in the procurement directive applies to the contractor, provided that such obligation does not hinder or delay the contractor's participation in the public contract in question or give rise to excessive administrative charges, and provided that its sole objective is to check the professional qualities of the contractor concerned, for the purposes of that provision. The fact that a contractor established in another Member State has produced certificates issued by the competent authorities of that State is not sufficient to confirm, conclusively, that it has fulfilled its obligations in that regard. Thus, a registration obligation cannot be regarded as an additional ground for exclusion, in addition to those exhaustively listed in the procurement directive, if it is designed as a means of implementing that provision, solely to check the evidence that a contractor wishing to participate

in a public contract does not fall fowl of one of those grounds for exclusion, particularly those relating to the payment of social security contributions and taxes.

104. Judgment of 15 July 2010, Case C-271/08, European Commission v. Germany (Old-age pensions of local authority employees)

- **Public service contracts — Occupational old-age pensions of local authority employees — Direct award of contracts, without a call for tenders at European Union level, to pension providers designated in a collective agreement concluded between management and labour.**

The fact that the right to bargain collectively is a fundamental right, and the social objective, perceived as a whole, of a collective agreement on the conversion, for local authority employees, of earnings into pension savings, cannot in themselves mean that local authority employers are automatically excluded from the obligation to comply with the requirements stemming from the procurement directive, which implements freedom of establishment and the freedom to provide services in the field of public procurement. The terms of collective agreements are not excluded from the scope of the provisions on freedom of movement for persons. In the case of contracts concerning services for the provision of occupational old-age pensions for local authority employees by means of the conversion of earnings into pension savings, the ‘estimated contract value’, within the meaning of the procurement directive, corresponds to the estimated value of the premiums, that is to say, the estimated value of the contributions deducted, under salary conversion, from the earnings of the relevant workers in the local authority or local authority undertaking concerned and used to finance the ultimate occupational old-age pension benefits. Those premiums constitute the principal consideration for the services provided by the body or undertaking concerned to the local authority employer in the context of the provision of those benefits.

105. Judgment of 18 November 2010, Case C-226/09, European Commission v. Ireland (contract for interpretation and translation services)

- **Award of a contract for interpretation and translation services — Services not subject to all the requirements of the procurement directive — Weighting of the award criteria determined after tenders have been submitted — Weighting altered following an initial review of the tenders submitted — Compliance with the principle of equal treatment and the obligation of transparency.**

Even though contracting authorities which conclude contracts that are not subject to the rules laid down in the procurement directive relating to the requirements to put contracts out to competition by means of prior advertising, they nevertheless remain subject to the fundamental rules of the European Union, in particular to the principles laid down by the Treaty on the Functioning of the European Union on the right of establishment and the freedom to provide services. Accordingly, these contracts may not be interpreted as precluding application of the principles deriving from Articles 49 TFEU and 56 TFEU or, therefore, of the requirements designed to ensure transparency of procedures and equal treatment of tenderers, if such

contracts are nevertheless of certain cross-border interest. While the requirement to state the relative weighting for each of the award criteria at the stage of publication of the contract notice, as provided for in the public procurement directive, meets the requirement of ensuring observance of the principle of equal treatment and compliance with the consequent obligation of transparency, it cannot legitimately be argued that the scope of that principle and that obligation extends, in the absence of a specific provision to that effect in the Directive, to requiring the relative weighting of criteria used by the contracting authority to be determined in advance and notified to potential tenderers when they are invited to submit their bids. Indeed, the reference to the weighting of the award criteria in the case of a contract that is not subject to the procurement directive does not constitute an obligation for the contracting authority. The principles of equal treatment and transparency of tender procedures imply an obligation on the part of contracting authorities to interpret the award criteria in the same way throughout the procedure. As far as the award criteria themselves are concerned, it is *a fortiori* clear that they must not be amended in any way during the tender procedure. Consequently, a Member State that alters the weighting of the award criteria for a contract for the provision of interpretation and translation services following an initial review of the tenders submitted fails to fulfil its obligations under the principle of equal treatment and the consequent obligation of transparency.

106. Judgment of 22 December 2010, Case C-215/09, *Mehiläinen and Terveystalo Healthcare*

- **Public service contracts — Mixed contract** — Contract concluded between a contracting authority and a private company independent of it — Establishment, on an equal basis, of a joint venture to provide health care services — Undertaking by the partners to purchase health care services for their staff from the joint venture for a transitional period of four years.

The procurement directive must be interpreted as meaning that, when a contracting authority concludes with a private company independent of it a contract establishing a joint venture in the form of a share company, the purpose of which is to provide occupational health care and welfare services, the award by the contracting authority of the contract relating to the services for its own staff, the value of which exceeds the threshold laid down by that directive, and which is severable from the contract establishing that company, must be made in accordance with the provisions of the procurement directive. Although the creation, by a contracting authority and a private economic operator, of a joint enterprise is not covered as such by the procurement directive, a capital operation cannot, in reality, conceal the award to a private partner of contracts which might be considered to be public contracts or concessions. Furthermore, the fact that a private entity and a contracting entity cooperate within a mixed capital entity cannot justify failure to observe the provision or public procurement when awarding such a contract to that private entity or that mixed capital entity. Thus, where the need to conclude such a mixed contract with a single partner is not objectively demonstrated and the component of the mixed contract consisting in the undertaking by the contracting authority to purchase health care services for its staff from the joint venture is severable from that contract, the relevant provisions of the procurement directive are applicable to the award of that aspect.

107. Judgment of 10 March 2011, Case C-274/09, *Privater Rettungsdienst und Krankentransport Stadler*

- Public service concession — Rescue service — **Distinction between ‘public service contract’ and ‘service concession’.**

The difference between a public service contract and a service concession lies in the consideration for the provision of services. A service contract involves consideration which, although it is not the only consideration, is paid directly by the contracting authority to the service provider, while, for a service concession, the consideration for the provision of services consists in the right to exploit the service, either alone, or together with payment. In the case of a contract for the supply of services, the fact that the supplier is not remunerated directly by the contracting authority, but is entitled to collect payment from third parties, meets the requirement of consideration laid down in the procurement directive. While the method of remuneration is, therefore, one of the determining factors for the classification of a service concession, the service concession implies that the service supplier takes the risk of operating the services in question and that the absence of a transfer to the service provider of the risk connected with operating the service shows that the transaction concerned is a public service contract and not a service concession. In order to find that there is a service concession, it is necessary to establish whether the agreed method of remuneration takes the form of the right of the service provider to exploit the service and entails it taking the risk of operating the service in question. While that risk may, at the outset, be very limited, it is necessary for classification as a service concession that the contracting authority transfer to the concession holder all or, at least, a significant share of the risk which it faces. When the economic operator selected is fully remunerated by persons other than the contracting authority which awarded the contract concerning rescue services, when it runs an operating risk, albeit a very limited one, by reason, *inter alia*, of the fact that the amount of the usage fees in question depends on the result of annual negotiations with third parties, and when it is not assured full coverage of the costs incurred in managing its activities in accordance with the principles laid down by national law, that contract must be classified as a ‘service concession’. The fact that the amount of the usage fees is not determined unilaterally by the provider of the rescue services, but by agreement with the social security institutions which themselves have the status of a contracting authority, and that those fees are not paid directly by the users of those services to the selected provider but through a central settlement office in charge of collecting and remitting those fees, by regular payments on account, does not affect that finding. The fact remains that all the remuneration obtained by the provider of the services comes from persons other than the contracting authority which awarded it the contract.

108. Judgment of 26 May 2011, Case C-306/08, European Commission v. Spain (Urban development of the community of Valencia)

- **Procedures for the award of public works contracts** – Urban development legislation of the Autonomous Community of Valencia — Public works contracts – Definition – Mixed contracts – Rules applicable

The concept of ‘public works contracts’ within the meaning of the procurement directive, covers ‘contracts for pecuniary interest’, concluded in writing between one or more economic operators and one or more contracting authorities and having as their object either the execution, or both the design and execution, of works related to one of the activities referred to in Annex II to the directive or of a work defined in this directive, or the execution, by whatever means, of a work corresponding to the requirements specified by the contracting authority. A contract may be deemed to be a ‘public works contract’ only if its subject-matter corresponds to that definition. Works which are incidental to, and not the subject-matter of, the contract do not justify its qualification as a public works contract. When a contract contains elements relating both to a public works contract and to another type of contract, it is the main object of the contract that determines which body of rules of European Union law on public contracts is, in principle, to be applied. That determination must be made in the light of the essential obligations which predominate and which, as such, characterize the transaction, as opposed to those which are only ancillary or supplementary in nature and are required by the very object of the contract.

109. Judgment of 10 May 2012, Joined Cases C-357/10 to C-359/10, Duomo

- **Concession relating to the assessment, verification and collection of taxes and other local authority revenue** — National legislation — Minimum share capital — Obligation

Articles 43 EC and 49 EC must be interpreted as precluding a provision under which: (1) economic operators, except companies in which all or a majority of the share capital is in public ownership, are required to increase, if necessary, their fully paid up capital to a minimum of EUR 10 million in order to be entitled to pursue the activities of assessment, verification and collection of taxes and other local authority revenue; (2) the award of those services to operators who fail to satisfy the minimum requirement of share capital is to be null and void, and (3) it is prohibited to obtain new contracts or participate in tender procedures for the operation of those services until the abovementioned requirement to adjust share capital has been met. Such an obligation amounts to a restriction of the freedom of establishment and the freedom to provide services in so far as, first, it contains a condition of minimum share capital and, second, it forces private operators wishing to pursue the activities at issue in the main proceedings to incorporate. Thus, such a provision impedes or renders less attractive the freedom of establishment and the freedom to provide services. In addition, that provision contains disproportionate and therefore unjustified restrictions of the freedoms laid down in Articles 43 EC and 49 EC in so far as it goes far beyond what is necessary in order to protect public authorities from non-performance by concession holders.

110. Judgment of 10 May 2012, Case C-368/10, European Commission v. The Netherlands (Dutch coffee case)

- Contract for the supply, installation and maintenance of dispensing machines for hot drinks, and the supply of tea, coffee and other ingredients — **Technical specifications** — **Conditions for performance of the contract** — **Criteria for award of the contracts** — Most economically advantageous tender — Products derived from organic agriculture and fair trade — Use of labels in the formulation of the technical specifications and the award criteria — Concept of ‘additional information’ — Principles for award of contracts — Principle of transparency — Verification of the suitability and choice of participants — Minimum level of technical or professional abilities — Compliance with ‘criteria of sustainability of purchases and socially responsible business’

A Member State fails to fulfill its obligations laid down in the procurement directive when a contracting authority from that State, in a tendering procedure for a public contract for the supply and management of drink dispensing machines: i. has laid down a technical specification incompatible with the procurement directive by requiring that certain products to be supplied were to bear a specific eco-label, rather than using detailed specifications; ii. has established award criteria incompatible with the procurement directive by providing that the fact that certain products to be supplied bore specific labels would give rise to the grant of a certain number of points in the choice of the most economically advantageous tender, without listing the criteria underlying those labels and without allowing proof to be adduced by any suitable means that a product satisfied those underlying criteria; iii. has established a minimum level of technical ability not authorised by the procurement directive by imposing, on the basis of suitability requirements and minimum capacity levels stated in the specifications applicable in the context of that contract, the condition that tenderers must comply with the ‘criteria of sustainable purchasing and socially responsible business’ and state how they comply with those criteria and ‘contribute to improving the sustainability of the coffee market and to environmentally, socially and economically responsible coffee production’, and iv. has laid down a clause contrary to the obligation of transparency provided for in the procurement directive by requiring tenderers to comply with ‘the criteria of sustainable purchasing and socially responsible business’ and to state how they comply with those criteria and ‘contribute to improving the sustainability of the coffee market and to environmentally, socially and economically responsible coffee production’.

111. Judgment of 7 June 2012, Case C-615/10, Engineering Firm InsTiimi

- **Public contracts in the field of defence** — Protection of a Member State’s essential security interests — Trade in arms, munitions and war material — Product procured by a contracting authority specifically for military purposes — Existence, as regards that product, of a potential and largely identical not put out to tender in accordance with the procedures provided for by the procurement civilian application — Tilttable turntable for carrying out electromagnetic measurements — Contract directive.

A Member State is authorised to set aside the procedures laid down by the procurement directive in the case of a public contract awarded by a contracting authority in the field of defence

for the acquisition of material which, although intended for specifically military purposes, also presents possibilities for essentially identical civilian applications only if that material, by virtue of its intrinsic characteristics, may be regarded as having been specially designed and developed, also as a result of substantial modifications, for such purposes, this being a matter for the referring court to determine.

112. Judgment of 29 November 2012, Joined Cases C-182/11 and C-183/11, Econord

- Public service contracts — **Contracting authority exercising over a legally distinct successful tenderer control similar to that exercised over its own departments — No obligation to carry out a tendering procedure in accordance with the rules of EU law ('in-house' award) — Successful tenderer controlled jointly by several local authorities — Conditions for the applicability of an in-house award.**

Where, in their capacity as contracting authority, a number of public authorities jointly establish an entity with responsibility for carrying out their public service mission, or where a public authority subscribes to such an entity, the condition established by the case-law of the Court of Justice of the European Union to the effect that, in order to be exempted from their obligation to initiate a public tendering procedure in accordance with the rules of EU law, those authorities must jointly exercise over that entity control similar to the control they exercise over their own departments, is fulfilled where each of those authorities not only holds capital in that entity, but also plays a role in its managing bodies. There is similar control where the entity in question is subject to a control which enables the contracting authority to influence that entity's decisions. It must be a case of a power of decisive influence over both strategic objectives and significant decisions of that entity. In other words, the contracting authority must be able to exercise a structural and functional control over that entity. That control must also be effective. Where use is made of an entity jointly owned by a number of public authorities, the similar control may be exercised jointly by those authorities, without it being essential for such control to be exercised individually by each of them. It follows that, if a public authority becomes a minority shareholder in a company limited by shares with wholly public capital for the purpose of awarding the management of a public service to that company, the control that the public authorities which are members of that company exercise over it may be categorised as similar to the control they exercise over their own departments when it is exercised by those authorities jointly. In those circumstances, although, where a number of public authorities make use of a common entity for the purposes of carrying out a common public service task, it is certainly not essential that each of those authorities should in itself have an individual power of control over that entity. However, if the very concept of joint control is not to be rendered meaningless, the control exercised over that entity cannot be based solely on the controlling power of the public authority with a majority holding in the capital of the entity concerned. 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.

- Public procurement — Postal services sector — **Exclusion criteria in relation to the procedure for the award of a contract** — Grave professional misconduct — Protection of the public interest — Maintenance of fair competition

The procurement directive must be interpreted as precluding national legislation which provides that a situation of grave professional misconduct, which leads to the automatic exclusion of an economic operator from a procedure for the award of a public contract in progress, arises where the contracting authority concerned has annulled, terminated or renounced a public contract with that same economic operator owing to circumstances for which that operator is responsible, where the annulment, termination or renouncement occurred in the three-year period before the procedure was initiated and the value of the non-performed part of the contract amounted to at least 5% of the contract's value. The concept of 'grave misconduct' must be understood as normally referring to conduct by the economic operator at issue which denotes a wrongful intent or negligence of a certain gravity on its part. Accordingly, any incorrect, imprecise or defective performance of a contract or a part thereof could potentially demonstrate the limited professional competence of the economic operator at issue, but does not automatically amount to grave misconduct. In addition, in order to find whether grave misconduct exists, a specific and individual assessment of the conduct of the economic operator concerned must, in principle, be carried out. In this regard, the concept of 'grave misconduct' cannot be replaced by the concept of 'circumstances for which the economic operator concerned is responsible'. Consequently, national rules which do not merely follow the general framework of the procurement directive, but impose on the contracting authorities mandatory requirements and conclusions to be automatically drawn in certain circumstances, without allowing the contracting authority the power to assess, on a case-by-case basis, the gravity of the allegedly wrongful conduct of that operator in the performance of the previous contract, exceed, therefore, the discretion enjoyed by the Member States, pursuant to the procurement directive, in specifying the implementing conditions for the ground for exclusion set out in the procurement directive. The principles or rules of European Union public procurement law do not allow, on the grounds of the protection of the public interest, the legitimate interests of the contracting authorities or the maintenance of fair competition between economic operators, national legislation, requiring the contracting authorities to automatically exclude an economic operator for grave professional misconduct without carrying out a specific and individual assessment of the conduct of the economic operator concerned. The procurement directive exhaustively lists the grounds capable of justifying the exclusion of a contractor from participation in a contract for reasons, based on objective factors, that relate to his professional qualities and therefore precludes Member States from adding to the list contained in that provision other grounds for exclusion based on criteria relating to professional qualities. It is only when the grounds for exclusion concerned do not relate to the professional qualities of economic operators, and, therefore, do not fall within that exhaustive list that it is possible to consider whether those grounds may be permissible under the principles or other rules of European Union public procurement law.

114. Judgment of 19 December 2012, Case C-159/11, Azienda Sanitaria Locale di Lecce and Università del Salento v Ordine degli Ingegneri della Provincia di Lecce and Others

- Services — Study and evaluation of the seismic vulnerability of hospital structures — **Contract concluded between two public entities, one of which is a university** — Public entity capable of being classified as an economic operator — Contract for pecuniary interest — Consideration not exceeding the costs incurred.

A public contract falls within the procurement directive on the condition that the estimated value thereof reaches the threshold laid down in that directive, taking into consideration the usual value on the market of the works, supplies or services to which that public contract relates. Otherwise, the fundamental rules and the general principles of the TFEU, in particular the principles of equal treatment and of non-discrimination on grounds of nationality and the consequent obligation of transparency apply, provided that the contract concerned has a certain cross-border interest in the light, inter alia, of its value and the place where it is carried out. A contract for pecuniary interest concluded in writing between an economic operator and a contracting authority and having as its object the provision of services, is a public contract, even if that operator is himself a contracting authority. It is also immaterial whether the body concerned is primarily profit-making, whether it is structured as an undertaking or whether it has a continuous presence on the market. Furthermore, a contract cannot fall outside the concept of public contract merely because the remuneration remains limited to reimbursement of the expenditure incurred to provide the agreed service. In addition, consultancy activities concerning the study and the evaluation of the seismic vulnerability of hospital structures, notwithstanding the fact that they are capable of coming under academic research, fall, according to the actual nature of those activities, either within the framework of research and development services covered by the procurement directive or within the framework of engineering services and related scientific and technical consulting services covered by that directive. European Union public procurement law precludes national legislation which authorises the conclusion, without an invitation to tender, of a contract by which public entities establish cooperation among each other where — this being for the national court to establish — the purpose of such a contract is not to ensure that a public task that those entities all have to perform is carried out, where that contract is not governed solely by considerations and requirements relating to the pursuit of objectives in the public interest or where it is such as to place a private provider of services in a position of advantage vis-à-vis his competitors. Only two types of contracts entered into by a public entity do not fall within the scope of European Union public procurement law. The first type of contracts are those concluded by a public entity with a person who is legally distinct from that entity where, at the same time, that entity exercises over the person concerned a control which is similar to that which it exercises over its own departments and where that person carries out the essential part of its activities with the entity or entities which control it. The second type of contracts are those which establish cooperation between public entities with the aim of ensuring that a public task that they all have to perform is carried out, in so far as, in addition, such contracts are concluded exclusively by public entities, without the participation of a private party, no private provider of services is placed in a position of advantage vis-à-vis his competitors and implementation of that cooperation is governed solely by considerations and requirements relating to the pursuit of objectives in the public interest.

115. Judgment of 8 May 2013, Joined Cases C-197/11 and C-203/11, Eric Libert and others

- Fundamental freedoms — Restriction — Justification — State aid — **Concept of ‘public works contract’** — Land and buildings located in certain communes — National legislation making the transfer of land and buildings subject to the condition that there exists a ‘sufficient connection’ between the prospective buyer or tenant and the target commune — Social obligation on subdividers and developers — Tax incentives and subsidy mechanisms – Procedures for the award of public works contracts, public supply contracts and public service contracts – Directive 2004/18 – Public works contracts — Concept — Development of social housing units which are subsequently to be sold at capped prices to a public social housing institution, or with substitution of that institution for the service provider which developed those units — Included — Conditions — Assessment by the national court

The development of social housing units which are subsequently to be sold at capped prices to a public social housing institution, or with substitution of that institution for the service provider which developed those units, is covered by the concept of ‘public works contract’ contained in the procurement directive, where the criteria set out in that directive have been met, a matter which falls to be determined by the referring court.

116. Judgment of 13 June 2013, Case C-386/11, Piepenbrock

- Definition of ‘public contract’ — **Contract concluded between two local authorities** — Public service contracts — Meaning — Contract concluded between two public entities providing for a transfer by one entity of the responsibility for cleaning certain of its buildings to the other entity in return for financial compensation and authorising the latter to avail of the services of third parties for the accomplishment of that task — Inclusion

A contract – whereby, without establishing cooperation between the contracting public entities with a view to carrying out a public service task that both of them have to perform, one public entity assigns to another the task of cleaning certain office, administrative and school buildings, while reserving the power to supervise the proper execution of that task, in return for financial compensation intended to correspond to the costs incurred in the performance of the task, the second entity being, moreover, authorised to avail of the services of third parties which might be capable of competing on the market for the accomplishment of that task – constitutes a public service contract within the meaning of the procurement directive.

117. Judgment of 12 September 2013, Case C-526/11, Ärztekammer Westfalen-Lippe

- **Concept of ‘body governed by public law’** — Condition relating to the financing of the activity, or to management supervision, or to supervision of the activity by the State, by regional or local authorities or other bodies governed by public law — Association of medical practitioners — Financing provided for by law by means of contributions paid by the

members of that association — Amount of the contributions fixed by the assembly of that association — Independence of that association in determining the scope and the rules for the performance of its statutory duties

The procurement directive must be interpreted as meaning that a body such as a professional association governed by public law satisfies neither the criterion relating to financing for the most part by the public authorities when that body is financed for the most part by contributions paid by its members, in respect of which it is authorised by law to fix and collect the amount, if that law does not determine the scope of, and procedures for, the actions undertaken by that body in the performance of its statutory tasks, which those contributions are intended to finance, nor the criterion relating to management supervision by the public authorities simply because the decision by which that body sets the amount of those contributions must be approved by a supervisory authority. In that connection, as regards the criterion laid down in the procurement directive relating to financing for the most part by the public authorities includes a method of indirect financing which may be made by means of a fee provided for and imposed by statute as regards its principle and amount, and which does not constitute consideration for actual use of services provided by the body concerned by the persons liable to pay the fee and in respect of which the detailed rules for collection derive from the powers of a public authority. Although the fact that, formally, a body itself fixes the amount of contributions which provide for the greater part of its functions does not exclude the fact that there may be indirect financing satisfying that criterion, that is not the case where the body has a considerable degree of autonomy to determine the nature, scope and procedures for the actions it undertakes in order to perform its tasks and to set the budget necessary to that end and, consequently, the amount of contributions it will claim from its members. Furthermore, as regards the second criterion laid down in the procurement directive relating to management supervision by the public authorities, a review *ex post facto* does not satisfy that criterion, in principle, for such a review does not enable the public authorities to influence the decisions of the body in question in relation to public contracts. That is the case, in principle, of a general review of legality conducted *ex post facto* by a supervisory authority and, *a fortiori*, of an action taken by that authority in the form of approval of the body's decision fixing the amount of contributions which provide for the greater part of its financing, which is confined to ascertaining that the body's budget is balanced. Therefore, the means of financing of a body, such as a professional association governed by public law, do not constitute financing for the most part by the public authorities and do not allow management supervision of that body by the public authorities.

118. Judgment of 10 October 2013, Case C-336/12, *Manova*

- **Principle of equal treatment** — Restricted procedure — Contract notice — Requirement for a copy of the most recent published balance sheet to be enclosed with the application — Copies of balance sheets not enclosed with some candidates' applications — Right of the contracting authority to ask those candidates to provide copies of those balance sheets after the deadline for filing applications

The principle of equal treatment must be interpreted as not precluding a contracting authority from asking a candidate, after the deadline for applying to take part in a tendering procedure, to

provide documents describing that candidate's situation — such as its published balance sheet — which can be objectively shown to pre-date that deadline, so long as it was not expressly laid down in the contract documents that, unless such documents were provided, the application would be rejected. That request must not unduly favour or disadvantage the candidate or candidates to which it is addressed. Such a request for clarification of a tender must, as a general rule, be sent in an equivalent manner to all tenderers in the same situation, must relate to all sections of the tender which require clarification, and may not lead to the submission, by a tenderer, of what would appear in reality to be a new tender.

119. Judgment of 10 October 2013, Case C-94/12, SWM Costruzioni

- **Qualitative selection** — Economic and financial standing — Technical and/or professional ability — Right of an economic operator to rely on the capacities of other entities — Certification system — Public works contracts — National legislation requiring possession of a qualification certificate corresponding to the category and the value of the works covered by the contract — Prohibition on reliance on the certificates of more than one entity for works within the same category

The procurement directive must be interpreted as precluding a national provision which prohibits, as a general rule, economic operators participating in a tendering procedure for a public works contract from relying on the capacities of more than one undertaking for the same qualification category. A fortiori, those provisions do not lay down any general prohibition regarding a candidate or tenderer's reliance on the capacities of one or more third-party entities in addition to its own capacities in order to fulfil the criteria set by a contracting authority. That finding is corroborated by several provisions of the procurement directive. It is, furthermore, consistent with the objective of attaining the widest possible opening-up of public contracts and is capable of facilitating the involvement of small- and medium-sized undertakings in the contracts procurement market, which is an aim also pursued by that directive.

120. Judgment of 5 December 2013, Case C-561/12, Nordecon

- Public procurement — **Negotiated procedure with prior publication of a contract notice** — Whether possible for the contracting authority to negotiate on tenders which do not comply with the mandatory requirements of the technical specifications relating to the contract

The procurement directive does not allow the contracting authority to negotiate with tenderers tenders that do not comply with the mandatory requirements laid down in the technical specifications of the contract. Even though the contracting authority has the power to negotiate in the context of a negotiated procedure, it is still bound to see to it that those requirements of the contract that it has made mandatory are complied with. Were that not the case, the principle that contracting authorities are to act transparently would be breached and the aim of precluding any risk of favouritism or arbitrariness on the part of the contracting authority could not be attained. Moreover, allowing a tender that does not comply with the mandatory requirements to be admissible with a view to negotiations would entail the fixing of mandatory conditions in the

call for tenders being deprived of useful effect and would not allow the contracting authority to negotiate with the tenderers on a basis, made up of those conditions, common to those tenderers and would not, therefore, allow it to treat them equally.

121. Judgment of 8 May 2014, Case C-15/13, Technische Universität Hamburg

- Public supply contracts — Award of a contract without initiating a tendering procedure — **In-house award** — Contractor legally separate from the contracting authority — Condition of ‘similar control’ — Contracting authority and contractor not linked by a relationship of control — Third party public authority exercising partial control over the contracting authority and control over the contractor which could be qualified as ‘similar’ — ‘Horizontal in-house transaction’

A contract for the supply of products concluded between (i) a university which is a contracting authority and whose purchases of products and services are controlled by a German Federal State, and (ii) an undertaking under private law, owned by the Federation and by Federal States, including the abovementioned Federal State, constitutes a public contract and must therefore be subject to the public procurement rules laid down in the procurement directive.

122. Judgment of 19 June 2014, Case C-574/12, Centro Hospitalar de Setúbal

- Public service contracts - Award of the contract without a procurement procedure (**in-house award**) - Contractor legally separate from the awarding authority - Centre for hospital assistance and support services - Non-profit association operating in the public interest - Majority of the partners made up of awarding authorities - Minority of the partners made up of entities under private law, non-profit charitable associations - Activity carried out of at least 80% of the annual turnover for the partners’ benefit.

Where the contractor under a public contract is a non-profit association which, at the time of the award of the contract, has as partners not only public sector entities but also private social solidarity institutions carrying out non-profit activities, the requirement for similar control in order for an award of a public contract to be regarded as an in-house operation, is not met, with the result that the procurement directive applies. The fact that the participation of private partners in the contractor is merely as a minority is not sufficient to call those conclusions into question. Furthermore, the fact that the contractor is an association governed by private law and that it is non-profit is irrelevant as regards the application of the rules of EU law on public contracts and, in consequence, as regards the exception for in-house operations. Such a fact does not preclude the contractor in question from carrying out an economic activity.

123. Judgment of 10 July 2014, Case C-213/13, Impresa Pizzarotti

- **Public works contracts - 'Undertaking to let' buildings which have not yet been constructed.**

Where the main object of a contract is the execution of a work corresponding to the requirements expressed by the contracting authority, that contract constitutes a public works contract, even if it contains an undertaking to let the work in question. In order for it to be possible to conclude that there is a public works contract for the purposes of the procurement directive, the execution of a work must correspond to the requirements specified by the contracting authority. Such is the case where that authority has taken measures to define the characteristics of the work or, at the very least, has had a decisive influence on its design. Moreover, the decisive element for the purposes of the classification of the contract is the main object of that contract, not the amount paid to the contractor or the arrangements for payment.

124. Judgment of 10 July 2014, Case C-358/12, Consorzio Stabile Libor Lavori Pubblici

- **Contracts falling below the threshold provided for in the procurement directive - Articles 49 TFEU and 56 TFEU - Principle of proportionality - Conditions for exclusion from a tender procedure - Criteria for qualitative selection relating to the personal situation of the tenderer - Obligations relating to the payment of social security contributions - Definition of serious infringement - Difference between the sums owed and those paid which exceeds EUR 100 and is greater than 5% of the sums owed.**

Articles 49 TFEU and 56 TFEU and the principle of proportionality must be interpreted as not precluding national legislation which, with regard to public works contracts the value of which is below the threshold laid down in the procurement directive, requires the contracting authorities to exclude from the award procedure for such a contract a tenderer who has committed an infringement relating to social security contributions where the difference between the sums owed and those paid exceeds EUR 100 and is greater than 5% of the sums owed. Although such a national provision which is capable of excluding tenderers from participating in a procurement procedure with a certain cross-border interest amounts to a restriction within the meaning of Articles 49 TFEU and 56 TFEU, it may be justified in so far as it pursues a legitimate objective in the public interest and to the extent that it complies with the principle of proportionality. The pursuance of such a legitimate objective includes the indication of the lack of reliability, diligence and responsibility by an economic operator in complying with its legal and social obligations. Such an indication is, moreover, in keeping with the principles of proportionality as the establishment of a precise threshold for the exclusion from procurement procedures, such as that defined by the national legislation at issue, is based on objective, non-discriminatory criteria known in advance. Those criteria ensure not only equal treatment of tenderers but also legal certainty, a principle which must be complied with for a restrictive measure to be proportionate. Lastly, as regards the level of that threshold for exclusion, the procurement directive does not provide for uniform application at EU level of the grounds of exclusion it mentions and allows the Member States to make the criteria laid down therein less onerous or more flexible. The procurement directive allows Member States to exclude from participation in a public contract

any economic operator which has failed to fulfill its obligations relating to the payment of social security contributions without any minimum amount of outstanding contributions being set.

125. Judgment of 6 November 2014, Case C-42/13, *Cartiera dell'Adda*

- **Principles of equal treatment and transparency — Grounds for excluding a tenderer from participating** — The personal situation of the candidate or tenderer — Compulsory statement concerning the person designated as 'technical director' — Statement not included with the tender — Exclusion from the contract without any possibility of remedying that omission.

The procurement directive and the principle of equal treatment and the obligation of transparency must be interpreted as not precluding the exclusion of an economic operator from a procurement procedure on the ground that the operator has failed to comply with the requirement laid down in the contract documentation to annex to his bid, on pain of exclusion, a statement to the effect that the person designated in the bid as the operator's technical director has not been the subject of criminal proceedings or a conviction, even where, at a date after the expiry of the deadline for submitting bids, such a statement has been provided to the contracting authority or it is shown that the person in question was identified as the technical director in error.

126. Judgment of 11 December 2014, Case C-113/13, *Azienda sanitaria locale n. 5 'Spezzino' and Others*

- **Ambulance services** — National legislation reserving ambulance services for public health establishments to registered voluntary associations fulfilling the legal requirements on a preferential basis — Compatibility with EU law — Public procurement — Articles 49 TFEU and 56 TFEU — Concept of 'public service contracts' — Pecuniary nature — Consideration consisting in the reimbursement of expenses incurred

Articles 49 TFEU and 56 TFEU must be interpreted as not precluding national legislation which provides that the provision of urgent and emergency ambulance services must be entrusted on a preferential basis and awarded directly, without any advertising, to the voluntary associations covered by the agreements, in so far as the legal and contractual framework in which the activity of those associations is carried out actually contributes to the social purpose and the pursuit of the objectives of the good of the community and budgetary efficiency on which that legislation is based. A Member State, in the context of its discretion to decide the level of protection of public health and to organise its social security system, may take the view that recourse to voluntary associations is consistent with the social purpose of the emergency ambulance services and may help to control costs relating to those services. Not only the risk of seriously undermining the financial balance of a social security system may constitute per se an overriding reason in the general interest capable of justifying an obstacle to the freedom to provide services, but also the objective of maintaining, on grounds of public health, a balanced medical and hospital service open to all may also fall within one of the derogations, on grounds of public health in so far as it contributes to the attainment of a high level of health protection. However, it is essential that,

where they act in that context, the voluntary associations do not pursue objectives other than the good of the community and economic efficiency, do not make any profit as a result of their services, apart from the reimbursement of the variable, fixed and on-going expenditure necessary to provide them, and do not procure any profit for their members. Furthermore, although it is permissible to maintain a workforce, for it would, without one, be almost impossible for those associations to act effectively in numerous domains in which the principle of the good of the community may naturally be implemented, the activities of those associations must strictly comply with the requirements laid down by national law relating to them. It is for the national court to carry out all the assessments required in order to verify whether the system of organisation of emergency ambulance services at issue in the main proceedings actually contributes to the social purpose and the pursuit of the objectives of the good of the community and budgetary efficiency on which that system is based.

127. Judgment of 11 December 2014, Case C-440/13, Croce Amica One Italia

- Public services contracts - **Personal situation of the candidate or tenderer - Provisional award of the contract** - Criminal investigations initiated in respect of the legal representative of the successful tenderer - Decision by the contracting authority not to proceed with the definitive award of the contract and to withdraw the invitation to tender.

The procurement directive must be interpreted as meaning that, where the conditions for the application of the grounds for exclusion set out in this directive are not fulfilled, that directive does not preclude the adoption by a contracting authority of a decision not to award a contract for which a procurement procedure has been held and not to proceed with the definitive award of the contract to the sole tenderer remaining in contention to whom the contract had been provisionally awarded. EU law does not preclude Member States from providing in their legislation for the possibility of adopting a decision to withdraw an invitation to tender. The grounds for such a decision may be based on reasons which reflect, inter alia, the assessment as to whether it is expedient, from the point of view of the public interest, to carry an award procedure to its conclusion, having regard, among other things, to any change that may arise in the economic context or factual circumstances, or indeed the needs of the contracting authority concerned. The grounds for such a decision may also relate to there being an insufficient degree of competition, due to the fact that, at the conclusion of the award procedure in question, only one tenderer was qualified to perform the contract. As a consequence, provided the principles of transparency and equal treatment are complied with, a contracting authority cannot be required to carry to its conclusion an award procedure that has been initiated and to award the contract in question, including where there remains only one tenderer in contention.

128. Judgment of 18 December 2014, Case C-470/13, Generali Providencia

- **Public procurement - Contracts falling below the threshold laid down in the procurement directive** - Articles 49 TFEU and 56 TFEU - Applicability - Certain cross-border interest - Grounds for exclusion from a tendering procedure - Exclusion of an economic operator

having committed an infringement of national competition rules, established by a judgment given not more than five years ago - Lawfulness - Proportionality.

Articles 49 TFEU and 56 TFEU do not preclude the application of national legislation excluding the participation in a tendering procedure of an economic operator who has committed an infringement of competition law, established by a judicial decision having the force of res judicata, for which a fine was imposed. The notion of professional misconduct, for the purposes of the procurement directive covers all wrongful conduct which has an impact on the professional credibility of the operator at issue and not only the infringements of ethical standards in the strict sense of the profession to which that operator belongs. In those circumstances, the commission of an infringement of the competition rules, in particular where that infringement was penalised by a fine, constitutes a cause for exclusion under the procurement directive. Moreover, if such a cause for exclusion is possible under the procurement directive, it must *a fortiori* be regarded as justified in relation to public contracts which fall short of the threshold defined in that directive and which are consequently not subject to the strict special procedures laid down in that directive.

129. Judgment of 18 December 2014, Case C-568/13, Data Medical Service

- **Public service contracts - Concepts of 'service provider' and 'economic operator'** - Public university hospital - Entity with legal personality and business and organisational autonomy - Principally non-profit-making activity - Institutional purpose of offering health services - Possibility of offering similar services on the market - Admission to participate in a tendering procedure for the award of a public contract.

The procurement directive precludes national legislation which excludes a public hospital from participation in tendering procedures for the award of public contracts as a result of its status as a public economic entity, if and in so far as that entity is authorised to operate on the market in accordance with its institutional and statutory objectives. It follows from both the EU rules and the case-law that any person or entity which, in the light of the conditions laid down in a contract notice, believes that it is capable of carrying out the contract is eligible to submit a tender or to put itself forward as a candidate, regardless of whether it is governed by public law or private law, whether it is active as a matter of course on the market or only on an occasional basis. In that regard, as is apparent from the wording of the procurement directive, the Member States do, admittedly, have discretion as to whether or not to allow certain categories of economic operators to provide certain services and can, inter alia, determine whether or not such entities are authorised to operate on the market, according to whether the activity in question is compatible with their objectives as an institution and those laid down in their statutes. However, if and to the extent that such entities are entitled to offer certain services in return for remuneration on the market, even occasionally, the Member States may not prevent those entities from participating in tendering procedures for the award of public contracts relating to the provision of those services. Such a prohibition would not be compatible with the procurement directive. The provisions of the procurement directive, and in particular the general principles of freedom of competition, non-discrimination and proportionality which underlie that directive, must be interpreted as not precluding national legislation which allows a public

hospital participating in a tendering procedure to submit a tender which cannot be matched by any competitors as a result of the public funding which it receives. However, in the course of the examination of the abnormally low character of a tender, the contracting authority may take into consideration the existence of public funding which such an entity receives in the light of the option to reject that tender. In that regard, it is true that, in certain specific circumstances, however, the contracting authorities are required, or at the very least permitted, to take into account the existence of subsidies, and in particular aid incompatible with the Treaty, in order, where appropriate, to exclude tenderers in receipt of such aid. However, since the procurement directive does not contain a definition of the concept of an abnormally low tender, it is for the Member States and, in particular, the contracting authorities to determine the method of calculating an anomaly threshold constituting an abnormally low tender within the meaning of that article. In that regard, the contracting authority may, in the course of its examination of the abnormally low character of a tender, take into consideration, for the purpose of ensuring healthy competition, not only the situations set out in the procurement directive but also all the factors that are relevant in the light of the service at issue. Moreover, the fact that the public entity concerned has separate accounts for its activities on the market and for its other activities may make it possible to establish whether a tender is abnormally low as a result of the effect of an element of State aid. However, the contracting authority may not conclude from the absence of such separate accounts that such a tender was made possible by the grant of a subsidy or State aid which is incompatible with the Treaty.

130. Judgment of 12 March 2015, Case C-538/13, eVigilo

- **Award of contracts — Criteria for evaluating tenderers** — Degree of conformity of the tenders submitted with the requirements included in the tender documentation — Lawfulness.

The provisions of the procurement directive must be interpreted as allowing, in principle, a contracting authority to use, as an evaluation criterion of tenders submitted by the tenderers for a public contract, the degree to which they are consistent with the requirements in the tender documentation. Since the list of tender evaluation criteria in the procurement directive is non-exhaustive, the contracting authority has the power to establish other award criteria, in so far as they are connected with the purpose of the contract and respect the principles set out in the procurement directive.

131. Judgment of 26 March 2015, Case C-601/13, Ambisig

- Public service contracts — Conduct of the procedure — **Contract award criteria — Qualifications of the staff assigned to performance of the contract** — Characteristics and merits of individual tenders — Professional abilities of the tenderer's team members — Lawfulness

With regard to procurement contracts for the provision of services of an intellectual nature, training and consultancy, the procurement directive does not preclude the contracting authority from using a criterion enabling evaluation of the teams specifically put forward by the tenderers

for the performance of the contract and which takes into consideration the composition of the team and the experience and academic and professional background of the team members. The quality of performance of a public contract may depend decisively on the 'professional merit' of the people entrusted with its performance, which is made up of their professional experience and background, as where the contract covers the provision of services of an intellectual nature and relates to training and consultancy. Where a contract of this nature is to be performed by a team, it is the abilities and experience of its members which are decisive for the evaluation of the professional quality of the team. That quality may be an intrinsic characteristic of the tender and linked to the subject-matter of the contract for the purposes of the procurement directive, with the result that it may be included as an award criterion in the contract notice or tendering specifications.

132. Judgment of 16 April 2015, Case C-278/14, Enterprise Focused Solutions

- Public procurement — Supply — Technical specifications — Principles of equal treatment and of non-discrimination — Obligation of transparency — Reference to a product of a particular brand — Assessment of the equivalence of the product offered by a tenderer — Reference product no longer in production
- Contract with a value below the threshold for application laid down by the directive but having certain cross-border interest — Included — Obligation to comply with the fundamental rules and general principles of the FEU Treaty — Amendment by the contracting authority of the technical specification for an element of a contract after publication of the contract notice — Breach of the principle of equal treatment and of the obligation of transparency

The award of contracts which, in view of their value, do not fall within the scope of the procurement directive, is none the less subject to the fundamental rules and the general principles of the FEU Treaty, in particular the principles of non-discrimination on grounds of nationality and of equal treatment and the consequent obligation of transparency, provided that those contracts have a certain cross-border interest in the light of certain objective criteria. Such criteria may be, in particular, that the contract in question is for a significant amount, in conjunction with the place where the work is to be carried out or the technical characteristics of the contract. The national court may, in its overall assessment of the existence of certain cross-border interest also take account of the existence of complaints brought by operators situated in other Member States, provided that it is determined that those complaints are real and not fictitious. The procurement directive is not applicable to a public contract with a value below the threshold for application laid down by that directive. In the context of a public contract not subject to that directive but which has certain cross-border interest, which it is for the national court to ascertain, the fundamental rules and general principles of the FEU Treaty, in particular the principles of equal treatment and of non-discrimination and the consequent obligation of transparency, must be interpreted as meaning that the contracting authority cannot reject a tender which satisfies the requirements of the contract notice on grounds which are not set out in that notice. Since the obligation of transparency is in particular intended to preclude any risk of arbitrariness on the part of the contracting authority, that objective would not be achieved if the contracting authority were able to disregard the conditions it had itself imposed. Accordingly,

it is prohibited from amending the award criteria during the award procedure. The principles of equal treatment and of non-discrimination and the obligation of transparency have the same effect in that respect with regard to the technical specifications. The contracting authority cannot, therefore, after publication of a contract notice, amend the technical specification in respect of an element of the contract in breach of the principles of equal treatment and of non-discrimination and the obligation of transparency. It is irrelevant, in that regard, whether or not the element to which that specification refers is still in production or available on the market.

133. Judgment of 6 October 2015, Case C-203/14, *ConSORCI SANITARI DEL MAREMME*

- Procedures for the award of public works contracts, public supply contracts and public service contracts — Economic operators — Concept — Public authorities — Included — Condition — Authorisation to offer services in return for remuneration on a market — **Establishment by the Member States of official lists of approved undertakings or of certification procedures** — National legislation not permitting public authorities to be registered on those lists or to obtain certification, whilst making participation in a tendering procedure conditional upon such registration or certification — Not permissible

The procurement directive must be interpreted as meaning that the term ‘economic operator’ in the second subparagraph of that provision encompasses public authorities, which may therefore participate in public tendering procedures if and to the extent that they are authorised to offer certain services in return for remuneration on a market. It follows from the provisions of the procurement directive, which specifically acknowledges that any public entity may have the status of economic operator, that this directive does not prevent public authorities from participating in tendering procedures. In that regard, any person which, in the light of the conditions laid down in a contract notice, believes that it is capable of carrying out the contract, either directly or by using subcontractors, is eligible to submit a tender or put itself forward as a candidate, regardless of whether it is governed by public law or private law, whether it is consistently active on the market or only on an occasional basis and whether or not it is subsidised by public funds. The procurement directive must be interpreted to the effect that — although it includes certain requirements with regard to the determination of the conditions for registration of economic operators on the national official lists and for certification — it does not exhaustively define (i) the conditions for registration of those economic operators on the national official lists or the conditions for their certification or (ii) the rights and obligations of public entities in that respect. In all events, Directive 2004/18 must be interpreted as precluding national rules under which, on the one hand, national public authorities that are authorised to offer the works, products or services covered by the contract notice concerned may not be registered on those lists, or may not obtain certification, while, on the other hand, the right to participate in the tendering procedure concerned is afforded only to operators which are included on those lists or which have obtained certification.

- Jurisdiction of the Court — Question raised concerning a public contract not falling within the scope of EU legislation — **Inclusion in the light of the certain cross-border interest of the contract** – Award of contracts — **Grounds for exclusion from participation in a tender procedure** — Member States' discretion — Limits — National legislation allowing a contracting authority to exclude tenderers not having accepted a legality protocol on combatting organised crime — Lawfulness — Automatic exclusion of tenderers abstaining from confirming the absence of an agreement or relationship of control or association with other tenderers and their commitment to not subcontract tasks to other participants in the procedure — Not permissible — Breach of principle of proportionality

As regards a question referred for a preliminary ruling on the interpretation of the procurement directive, even if the public contract at issue is of a lower value than the relevant threshold of that directive, it is appropriate to consider that the procedure for the award of the public contract at issue is none the less subject to the fundamental rules and the general principles of the FEU Treaty, in particular the principles of equal treatment and of non-discrimination on grounds of nationality and the consequent obligation of transparency, since the referring court accepts the application to the dispute before it of the principles of EU law and notes, in that context, the existence of certain cross-border interest. The fundamental rules and general principles of the FEU Treaty, in particular the principles of equal treatment and of non-discrimination and the consequent obligation of transparency, must be interpreted as not precluding a provision of national law under which a contracting authority may provide that a candidate or tenderer be automatically excluded from a tendering procedure relating to a public contract for not having lodged, with its tender, a written acceptance of the commitments and declarations contained in a legality protocol the purpose of which is to prevent organised crime from infiltrating the public procurement sector. However, inasmuch as that protocol contains declarations that the candidate or tenderer is not in a relationship of control or of association with other candidates or tenderers, has not concluded and will not conclude any agreement with other participants in the tendering procedure and will not subcontract any type of tasks to other undertakings participating in that procedure, the lack of such declarations is not to lead to the automatic exclusion of the candidate or tenderer from that procedure. As regards the principles of equal treatment and transparency, the Member States must be recognised to have a certain discretion for the purpose of adopting measures intended to ensure observance of those principles, which are binding on contracting authorities in any procedure for the award of a public contract. Each Member State is best placed to identify, in the light of historical, legal, economic or social considerations specific to it, situations propitious to conduct liable to bring about breaches of those principles. However, in accordance with the principle of proportionality, which constitutes a general principle of EU law, a measure such as the obligation to declare acceptance of a legality protocol must not go beyond what is necessary to achieve the intended objective. In that regard, the automatic exclusion of candidates or tenderers who are in a relationship of control or association with other candidates or tenderers goes beyond what is necessary to prevent collusive behaviour and, therefore, to ensure the application of the principle of equal treatment and observance of the obligation of transparency. Such an automatic exclusion constitutes an irrebuttable presumption of mutual interference in the respective tenders, for the same contract, of undertakings linked by a relationship of control or of association. Accordingly, it precludes the

possibility for those candidates or tenderers of showing that their tenders are independent and is therefore contrary to the EU interest in ensuring the widest possible participation by tenderers in a call for tenders.

135. Judgment of 22 October 2015, Case C-552/13, Grupo Hospitalario Quirón

- Public service contracts — Award of contracts — Public health services contracts — **Obligation to provide the services exclusively in establishments situated within the territory of a given municipality** — Not permissible — Breach of the principle of free access by tenderers to public procurement procedures

The procurement directive precludes a requirement expressed as a technical specification in public procurement notices relating to the provision of health services, whereby the medical services that are the subject of the calls for tenders must be provided by private hospital establishments situated exclusively within a given municipality, which is not necessarily that in which the patients concerned by those services reside, where that requirement involves the automatic exclusion of tenderers who cannot provide those services in such an establishment situated within that municipality but who satisfy all the other conditions of those calls for tenders. The requirement that a hospital establishment must imperatively be situated in a given municipality that is to be the place where the medical services concerned are exclusively to be provided constitutes a territorial constraint on performance, which by its nature is not such as to enable the objective of ensuring the proximity and accessibility of the private support hospital establishment to be achieved, in the interests of patients, their families and the medical personnel who are required to travel to that establishment, while ensuring equal and non-discriminatory access to the contracts in question by all tenderers. That requirement renders those contracts accessible only to those tenderers who can provide the services in question in an establishment situated within the designated municipality. It is therefore contrary to the provisions of the procurement directive.

136. Judgment of 17 November 2015, Case C-115/14, RegioPost

- Public service contracts — Award of contracts — Public health services contracts — **Obligation to provide the services exclusively in establishments situated within the territory of a given municipality** — Not permissible — Breach of the principle of free access by tenderers to public procurement procedures
- Article 56 TFEU — Freedom to provide services — Restrictions — Public procurement — Postal services — **Legislation of a regional entity of a Member State requiring tenderers and their subcontractors to undertake to pay a minimum wage to staff performing the services covered by the public contract**

The procurement directive must be interpreted as not precluding legislation of a regional entity of a Member State which requires tenderers and their subcontractors to undertake, by means of a written declaration to be enclosed with their tender, to pay staff who are called upon to

perform the services covered by the public contract in question a minimum wage laid down in that legislation. The procurement directive must be interpreted as not precluding legislation of a regional entity of a Member State which provides for the exclusion from participation in a procedure for the award of a public contract of tenderers and their subcontractors who refuse to undertake, by means of a written declaration to be enclosed with their tender, to pay staff who are called upon to perform the services covered by the public contract in question a minimum wage laid down in that legislation.

137. Judgment of 14 January 2016, Case C-234/14, *Ostas celtnieks*

- **Qualitative selection** – Economic and financial standing — Technical and/or professional ability — Tender specifications laying down the obligation for a tenderer to conclude a cooperation agreement or to set up a partnership with the entities on whose capacities it relies.

The procurement directive must be interpreted as precluding a contracting authority, in the tender specifications relating to the award of a public contract, from imposing on a tenderer which relies on the capacities of other entities the obligation, before the contract is awarded, to conclude a cooperation agreement with those entities or to form a partnership with them. In the context of the verification by the contracting authority of the tenderer's suitability to perform a particular contract, the procurement directive does not make it possible either to assume that a tenderer has or has not the means necessary to perform the contract or, a fortiori, to exclude a priori certain types of proof. It follows that the tenderer is free to choose, on one hand, the legal nature of the links it intends to establish with the other entities on whose capacities it relies in order to perform a particular contract and, on the other, the type of proof of the existence of those links. Furthermore, by expressly providing that it is only by way of example that the production of an undertaking by other entities to make available to the tenderer the resources necessary for the performance of the contract is acceptable proof of the fact that it actually has those resources, the procurement directive by no means precludes the tenderer from establishing in another way the existence of the links between it and other entities on whose capacities it relies for the proper performance of the contract.

138. Judgment of 28 January 2016, Case C-50/14, *Consorzio Artigiano Servizio Taxi e Autonoleggio (CASTA)*

- Public contracts — Articles 49 TFEU and 56 TFEU — **Medical transport services** — National legislation authorising regional health authorities to entrust medical transport activities to registered voluntary associations fulfilling the legal requirements, directly and without advertising, by means of reimbursement of the expenditure incurred — Lawfulness.

Articles 49 TFEU and 56 TFEU must be interpreted as meaning that they do not preclude national legislation which allows local authorities to entrust the provision of medical transport services by direct award, without any form of advertising, to voluntary associations, provided that the legal and contractual framework in which the activity of those associations is carried out

actually contributes to the social purpose and the pursuit of the objectives of the good of the community and budgetary efficiency. The award, in the absence of any transparency, of a contract to an undertaking located in the same Member State as the contracting authority amounts to a difference in treatment to the detriment of undertakings which might be interested in that contract but are established in another Member State. Unless it is justified by objective circumstances, such a difference in treatment, which, by excluding all undertakings established in another Member State, would operate mainly to the detriment of the latter undertakings, would amount to indirect discrimination on the basis of nationality, prohibited under Articles 49 TFEU and 56 TFEU. However, the Member States have the power to organise their public health and social security systems. Furthermore, not only the risk of seriously undermining the financial balance of a social security system may constitute, per se, an overriding reason in the general interest capable of justifying an obstacle to the freedom to provide services, but also the objective of maintaining, on grounds of public health, a balanced medical and hospital service open to all may also fall within one of the derogations on grounds of public health, in so far as it contributes to the attainment of a high level of health protection. Thus, measures which aim, first, to meet the objective of guaranteeing in the territory of the Member State concerned sufficient and permanent access to a balanced range of high-quality medical treatment and, secondly, assist in ensuring the desired control of costs and prevention, as far as possible, of any wastage of financial, technical and human resources are also covered. In that regard, a Member State, in the context of its discretion to decide the level of protection of public health and to organise its social security system, may take the view that recourse to voluntary associations is consistent with the social purpose of the ambulance services and may help to control costs relating to those services. It is essential that, where they act in that context, the voluntary associations do not pursue objectives other than those cited above, do not make any profit as a result of their services, apart from the reimbursement of the variable, fixed and on-going expenditure necessary to provide them, and do not procure any profit for their members. It is for the national court to carry out all the assessments required in order to verify whether the contract and, where relevant, the framework agreement, as regulated by the applicable legislation, actually contribute to the social purpose and the pursuit of the objectives of the good of the community and budgetary efficiency.

139. Judgment of 7 April 2016, Case C-324/14, Partner Apelski Dariusz

- Technical and/or professional abilities of economic operators — **Possibility to rely on the capacities of other entities** — Conditions and procedures — Nature of the links between the tenderer and the other entities — Amendment of the tender — Annulment and repetition of an electronic auction.

The procurement directive must be interpreted as meaning that:

- it recognises the right of all economic operators, as regards a specific contract, to rely on the capacities of other entities, whatever the nature of the links existing between it and those entities, provided that it is proved to the contracting authority that the candidate or tenderer will have at its disposal the resources of those entities necessary for the performance of that contract, and

— it is conceivable that the exercise of that right may be limited, in specific circumstances, having regard to the subject matter of the contract concerned and its objectives. Such is the case, in particular, where the capacities that a third party entity has, which are necessary for the performance of that contract, cannot be transferred to the candidate or the tenderer, so that the latter may rely on those capacities only if that third party entity directly and personally participates in the performance of that contract.

The procurement directive must be interpreted as meaning that, having regard to the subject matter of a particular contract and its objectives, the contracting authority may, in specific circumstances, for the purpose of the proper performance of that contract, expressly set out in the tender notice or the tender specifications the specific rules in accordance with which an economic operator may rely on the capacities of other entities, provided that those rules are related and proportionate to the subject matter and objectives of that contract. The principles of equal treatment and non-discrimination of economic operators, set out in the procurement directive, must be interpreted as meaning that, in circumstances such as those at issue in the main proceedings, they preclude a contracting authority, after the opening of the tenders submitted in a public procurement procedure, from acceding to the request of an economic operator which has submitted a tender for the whole of the contract concerned, to take its offer into consideration for the purpose of awarding only certain lots of that contract. The principles of equal treatment and non-discrimination of economic operators laid down in the procurement directive must be interpreted as meaning that they require the annulment and repetition of an electronic auction in which an economic operator having submitted an admissible tender has not been invited to take part, even if it cannot be established that the participation of that operator would have altered the outcome of the auction.

140. Judgment of 24 May 2016, Case C-396/14, Højgaard and Züblin

- **Procurement procedure in railway infrastructure sector — Principle of equal treatment of tenderers** — Group composed of two companies and admitted as such as a tenderer — Tender submitted by one of the two companies, in its own name, the other company having been declared insolvent — Company considered to be capable, by itself, of being admitted as a tenderer — Contract awarded to that company.

The principle of equal treatment of economic operators, stated in the procurement directive, must be interpreted as meaning that a contracting entity is not in breach of that principle where it permits one of two economic operators who formed part of a group of undertakings that had, as such, been invited to submit tenders by that contracting entity, to take the place of that group following the group's dissolution and to take part, in its own name, in a negotiated procedure for the award of a public contract, provided that it is established, first, that that economic operator by itself meets the requirements laid down by the contracting entity and, second, that the continuation of its participation in that procedure does not mean that other tenderers are placed at a competitive disadvantage.

141. Judgment of 2 June 2016, Case C-27/15, Pizzo

- Participation in a call for tenders — **Possibility of relying on the capacities of other undertakings in order to satisfy the necessary criteria** — Failure to pay a fee not expressly provided for — Exclusion from the contract without the possibility of rectifying that omission.

The procurement directive must be interpreted as not precluding national legislation which allows an economic operator to rely on the capacities of one or more third-party entities for the purpose of satisfying the minimum requirements for participating in a tendering procedure which are only partially satisfied by that operator. The principle of equal treatment and the obligation of transparency must be interpreted as precluding an economic operator from being excluded from a procedure for the award of a public contract as a result of that economic operator's non-compliance with an obligation which does not expressly arise from the documents relating to that procedure or out of the national law in force, but from an interpretation of that law and those documents and from the incorporation of provisions into those documents by the national authorities or administrative courts. Accordingly, the principles of equal treatment and of proportionality must be interpreted as not precluding an economic operator from being allowed to regularise its position and comply with that obligation within a period of time set by the contracting authority.

142. Judgment of 14 July 2016, Case C-6/14, Dimarso

- **Public supply contracts — Award criteria** — Most economically advantageous tender — Method of evaluation — Weighting rules — Obligation for the contracting authority to specify in the call for tenders the weighting of the award criteria — Scope of the obligation.

The procurement directive, read in the light of the principle of equal treatment and of the consequent obligation of transparency, must be interpreted as meaning that, in the case of a public service contract to be awarded pursuant to the criterion of the most economically advantageous tender in the opinion of the contracting authority, that authority is not required to bring to the attention of potential tenderers, in the contract notice or the tender specifications relating to the contract at issue, the method of evaluation used by the contracting authority in order to specifically evaluate and rank the tenders. However, that method may not have the effect of altering the award criteria and their relative weighting.

143. Judgment of 7 September 2016, Case C-549/14, Finn Frogne

- **Principle of equal treatment — Obligation of transparency** — Contract for the supply of a complex communications system — Difficulties in performance of the contract — Disagreement of the parties in regard to areas of responsibility — Settlement — Reduction in

the scope of the contract — Transformation of a rental of equipment into a sale of equipment — Material amendment to a contract — Justification by the objective expediency of achieving a settlement agreement.

The procurement directive must be interpreted as meaning that, following the award of a public contract, a material amendment cannot be made to that contract without a new tendering procedure being initiated even in the case where that amendment is, objectively, a type of settlement agreement, with both parties agreeing to mutual waivers, designed to bring an end to a dispute the outcome of which is uncertain, which arose from the difficulties encountered in the performance of that contract. The position would be different only if the contract documents provided for the possibility of adjusting certain conditions, even material ones, after the contract had been awarded and fixed the detailed rules for the application of that possibility.

144. Judgment of 10 November 2016, Case C-199/15, *Ciclat*

- **Conditions for exclusion from a procedure for the award of public works contracts, public supply contracts and public service contracts** — Obligations relating to the payment of social security contributions — Social security contributions payment certificate — Correction of irregularities

The procurement directive must be interpreted as not precluding national legislation which obliges a contracting authority to consider an infringement relating to the payment of social security contributions, recorded in a certificate requested by a contracting authority on its own initiative and issued by the social security institutions, to be a ground for exclusion, where that infringement existed on the date of the participation in a tender procedure, even if it no longer existed at the time of the award or of the verification carried out on the contracting authority's own initiative.

145. Judgment of 8 December 2016, Case C-553/15, *Undis Servizi*

- **Public service contracts** — Award of the contract without initiating a tendering procedure — So-called '**in-house**' award — Conditions — Similar control — Performance of the essential activity — Successful public capital tendering company owned by several local authorities — Activity also carried out for the benefit of local authorities which are not shareholders — Activity imposed by a public authority which is not a shareholder

In the context of the application of the Court's case-law on direct awards of so-called 'in-house' public contracts, in order to determine whether the contractor carries out the essential part of its activity for the contracting authority, including local authorities which are its controlling shareholders, an activity imposed on that contractor by a non-shareholder public authority for the benefit of local authorities which are also not shareholders of that contractor and do not exercise any control over it must not be taken into account, since that activity must be regarded as being carried out for third parties. For the purpose of determining whether the contractor carries out the essential part of its activity for the shareholder local authorities which jointly

exercise over it control similar to that which they exercise over their own departments, account must be taken of all the circumstances of the case, which may include activity carried out by that contractor for those local authorities before such joint control took effect.

146. Judgment of 14 December 2016, Case C-171/15, *Connexion Taxi Services*

- Public service contracts — **Personal situation of the candidate or tenderer** — **Optional grounds of exclusion** — Grave professional misconduct — National legislation providing for a case-by-case assessment in accordance with the principle of proportionality — Decisions of the contracting authorities

The procurement directive does not preclude national legislation which requires a contracting authority to assess, in accordance with the principle of proportionality, whether it is in fact appropriate to exclude from a public contract a tenderer which has been guilty of grave professional misconduct. The provisions of the procurement directive, read in the light of the principle of equal treatment and the obligation of transparency which derives from that, must be interpreted as precluding a contracting authority from deciding to award a public contract to a tenderer which has been guilty of grave professional misconduct on the ground that the exclusion of that tenderer from the award procedure would be contrary to the principle of proportionality, even though, according to the tender conditions of that contract, a tenderer which has been guilty of grave professional misconduct must necessarily be excluded, without consideration of the proportionality of that sanction.

147. Judgment of 21 December 2016, Case C-51/15, *Remondis*

- Respect for the national identity of Member States inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government — Internal organisation of the Member States — Regional authorities — **Legal instrument creating a new public-law entity and organising the transfer of powers and responsibilities for the performance of public tasks** — Concept of ‘public contract’

The procurement directive must be interpreted as meaning that an agreement concluded by two regional authorities, on the basis of which they adopt constituent statutes forming a special-purpose association with legal personality governed by public law and transfer to that new public entity certain competences previously held by those authorities and henceforth belonging to that special-purpose association, does not constitute a ‘public contract’. However, such a transfer of competences concerning the performance of public tasks exists only if it concerns both the responsibilities associated with the transferred competence and the powers that are the corollary thereof, so that the newly competent public authority has decision-making and financial autonomy.

