

UNICE CONFERENCE 2004

Oslo - October 1, 2004

WHEN IN GETS OUT

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2 Principles

- ◆ Suppliers may be either public or private entities
 - Directives' definition of tenderers
 - Art. 295 EC agnostic as to property ownership regime
 - procuring authorities enjoy "freedom of organisation"
- ◆ But award of procurement contract must comply with basic EC Treaty provisions
 - functioning of internal market (freedom to provide services, freedom of establishment, non-discrimination)
 - undistorted competition
 - public tenderer vis-à-vis private tenderers (Recital)

Principles

◆ ECJ, case *Lottomatica*, C-272/91

- call for tender which restricts participation in a contract to bodies the majority of whose capital is held by the public sector
→ infringement of freedom of establishment & freedom to provide services

◆ A fortiori where direct award to public operator

◆ Means to ensure compliance with Treaty

- procuring procedures (Directives) apply even where potential supplier is a public operator
- exceptions to be interpreted restrictively

Outer boundaries of in-house

① Specific exceptions

◆ Service contract to a public operator with ex ante exclusive right

- exclusive right compatible with EC Treaty
- operator is contracting authority

● Central purchasing body

- mere reseller/agent
- purchasers? only contracting authorities
- operator is contracting authority

② In-house exception

◆ Utilities Directive

- affiliated undertaking, joint venture formed exclusively by contracting authorities
- max. turnover from market (20%)
- stability of links (3 years)

◆ Teckal case

- close control over public operator
- essential part of operator's activity ...
- ... carried out with controlling authorities

③ General principle: procuring procedure

- ◆ All other instances where public operator as bidder

When to launch procuring procedure?

◆ Public operator (potential tenderer)

- no ex ante exclusive right to provide service (e.g. case-by-case choice)
- no central purchasing body
- no in-house entity (close control + principal activity)

◆ Contracting authority (purchaser)

- not located in exclusive territory covered by exclusive right (if exclusive right granted ex ante)
- no controlling authority/authorities (if in-house situation)

Ensuring undistorted competition where public operator as bidder

◆ Case ARGE Gewässerschutz, C-94/99

- participation of public bodies in procuring procedure is not in itself contrary to principle of equal treatment of tenderers
- ... except where distortion of competition

① All costs accounted for

- no illegal state aids
 - hidden subsidies (similar social security & tax requirements)
 - cross-subsidies, over compensation for public service
- transparent & separate accounts (Transparency Directive)
- sanctions of illegal aid: exclusion
 - repayment threatens financial well-being
 - abnormally low tenders [Art. 55 Classical Directive]

Ensuring undistorted competition where public operator as bidder

- ② No illegal economic activity of public operator, according to national law (speciality principle)
 - sanction: exclusion

- ③ No testing of the market
 - no discontinuance of procuring procedure, on grounds of in-house award
 - in-house ground favours national (public) tenderer
 - bad faith acting by contracting authority
 - award to in-house operator only if most economically advantageous tender

Genuine in-house situation

- ◆ **Close control over public operator**
 - intervention in day-to-day business (principal/agent)
 - absence of autonomous behaviour
 - see intra-group agreements in competition law (Art. 81)
 - degree of control assessed on case-by-case basis
- ➔ no mixed public-private entities
- ➔ formally/legally distinct (contract)
 - should publicly-controlled operators without legal personality automatically qualify for in-house status ?