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TRYBUNAŁ SPRAWIEDLIWOŚCI WSPÓLNOT EUROPEJSKICH  
TRIBUNAL DE JUSTIÇA DAS COMUNIDADES EUROPEIAS  
SÚDNY DVOR EURÓPSKÝCH SPOLOČENSTEV  
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EUROOPAN YHTEISÖJEN TUOMIOISTUIN  
EUROPEISKA GEMENSKAPERNAS DOMSTOL

Press and Information

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Judgment of the Court of Justice in Case C-26/03

*Stadt Halle and RPL Recyclingpark Lochau GmbH v. Arbeitsgemeinschaft Thermische Restabfall- und Energieverwertungsanlage TREA Leuna*

**THE AWARD OF A PUBLIC SERVICE CONTRACT TO AN UNDERTAKING WITH PARTLY PRIVATE CAPITAL, REGARDLESS OF THE PERCENTAGE OF THE HOLDING, DOES NOT CONSTITUTE AN IN-HOUSE OPERATION EXEMPTED FROM THE COMMUNITY PUBLIC PROCUREMENT RULES**

*In addition, the obligation of the Member States to ensure that effective and rapid remedies are available against decisions of contracting authorities extends also to decisions taken outside a formal procedure, in particular their initial decisions on whether or not to initiate a public procurement procedure provided for by Community law*

Stadt Halle (the City of Halle) asked RPL Lochau, a company in which the majority of the capital is held indirectly by Stadt Halle and the remainder by a private company, to draw up a plan for the construction of a thermal waste disposal and recovery plant for its residual urban waste, without formally issuing a call for tenders. At the same time it decided, again without issuing a call for tenders, to enter into negotiations with RPL Lochau with a view to concluding a contract for the management of that waste.

TREA Leuna, a company which was likewise interested in providing those services, contested the decision of Stadt Halle before the competent administrative authority. The authority considered that, contrary to Stadt Halle's arguments, the application was admissible, since even in the absence of an award procedure the decisions of the contracting authority ought to be subject to review. It also considered that because of the private shareholding there could be no question of an in-house operation to which the Community rules in the field of public procurement did not apply.

The Oberlandesgericht Naumburg, hearing the appeal brought by Stadt Halle, stayed the proceedings and referred a number of questions to the Court of Justice of the European Communities in this connection.

The Court of Justice rules that the judicial protection provided for by the relevant provisions of Community law<sup>1</sup>, namely the obligation of the Member States to ensure that effective and rapid remedies are available, extends also to decisions taken by contracting authorities outside a formal award procedure and decisions prior to a formal invitation to tender. That is the case in particular for their decisions on whether or not to initiate a public award procedure laid down by Community law.

Not amenable to review, however, are acts which constitute a mere preliminary study of the market or which are purely preparatory and form part of the internal reflections of the contracting authority with a view to a public award procedure.

By contrast, where the expression of the will of the contracting authority has passed that stage and is capable of producing legal effects, that expression is open to review. Thus, where a contracting authority decides not to initiate an award procedure because in its view the contract in question does not come under the relevant Community rules<sup>2</sup>, such a decision constitutes the very first decision amenable to judicial review. Review is available, in any event, against the entering into of specific contractual negotiations with an interested party.

The Court also rules that, where a contracting authority which intends to conclude a contract for pecuniary interest relating to services coming under Directive 52/90 with a company legally distinct from it, in whose capital it has a holding together with one or more private undertakings, it must always, regardless of the percentage of that holding, apply the public award procedures laid down by that directive. Otherwise, there would be interference with the objective of free and undistorted competition and with the principle of equal treatment, since an award without a call for tenders would offer a private undertaking with a capital presence in the undertaking in question an advantage over its competitors.

*Unofficial document for media use, not binding on the Court of Justice.*

*Languages available: DE EN FR IT*

*The full text of the judgment may be found on the Court's internet site*

*<http://curia.eu.int/jurisp/cgi-bin/form.pl?lang=en>*

*It can usually be consulted after midday (CET) on the day judgment is delivered.*

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<sup>1</sup> Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Council Directive 92/50/EC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), itself amended by European Parliament and Council Directive 97/52/EC of 13 October 1997 (OJ 1997 L 328, p. 1).

<sup>2</sup> Such as Directive 92/50, see preceding note.