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Press and Information

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Judgment of the Court of Justice in Case C-458/03

*Parking Brixen GmbH v Gemeinde Brixen and Stadtwerke Brixen AG*

**A PUBLIC AUTHORITY CANNOT AWARD A PUBLIC SERVICE CONCESSION  
TO A COMPANY WITHOUT PUTTING IT OUT TO TENDER IF THE  
TRANSACTION IS NOT ‘IN-HOUSE’**

*The public service contracts directive does not apply in respect of a concession, but the public authority must comply with the general rules of the EC Treaty as well as the principles of non-discrimination, equal treatment and transparency*

In 2001, the Municipality of Brixen (Italy) converted Stadtwerke Brixen, a municipal undertaking, into a company limited by shares, Stadtwerke Brixen AG. The company's nominal capital was 100% owned by the municipality which, however, was allowed under national legislation to remain the sole shareholder for only the following two years.

In 2002, the Municipality of Brixen concluded an agreement with Stadtwerke Brixen AG for the management, for a nine-year term, of a car park with about 200 spaces.

In consideration of the management of the car park, Stadtwerke Brixen AG collects the parking charges. In addition, it provides a free bicycle hiring service and accepts that the weekly market continues to be held on the area in question. Finally, the routine and non-routine maintenance of the area is the task of that company which takes full responsibility in that regard.

Parking Brixen GmbH, the company which managed another car park in the Municipality of Brixen, challenged before the Verwaltungsgericht, Autonome Sektion für die Provinz Bozen, the award of the management of the car park to Stadtwerke Brixen AG. In its submission, the Municipality of Brixen should have issued a public call for tenders.

The Municipality of Brixen maintained that it completely controls Stadtwerke Brixen AG and that there was therefore no award of a contract or concession to a third party. There was no obligation to proceed by way of a public call for tenders.

In that context, the Verwaltungsgericht, Autonome Sektion für die Provinz Bozen, referred two questions to the Court of Justice of the European Communities for a preliminary ruling.

The Court points out, first, that the Directive relating to the coordination of procedures for the award of public service contracts<sup>1</sup> applies to contracts which involve consideration which is paid directly by the contracting authority to the service provider, but does not apply to service concessions.

In this case, the service provider's remuneration comes from the sums paid by third party users of the car park concerned. That method of remuneration means that the provider takes the risk of operating the services in question and is thus characteristic of a public service concession.

Therefore, since it is a **public service concession**, the **directive does not apply**.

Nevertheless, the Court makes clear that a concession-granting public authority is, as a rule, bound to comply with the general rules of the EC Treaty such as freedom of establishment and freedom to provide services, as well as the principles of equal treatment, non-discrimination and transparency.

The application of those rules is excluded only if the concession-granting public authority exercises over the concessionaire a control similar to that which it exercises over its own departments and if that concessionaire carries out the essential part of its activities with the controlling authority. Such control must enable the concession-granting authority to have a decisive influence over both the concessionaire's strategic objectives and its significant decisions.

In this case, Stadtwerke Brixen AG enjoys a high degree of independence which precludes the municipality from exercising over it control similar to that which it exercises over its own departments. Indeed, the company's objects were broadened to other fields such as the carriage of persons and goods, its activities expanded to the whole of Italy and abroad, and its capital had to be opened to other shareholders. In addition, broad powers were conferred on its Administrative Board with, in practice, no management control by the municipality. Consequently, the award cannot be regarded as an 'in-house' transaction to which the rules and principles of Community law do not apply.

The Court concludes therefore that **the complete failure to put out to tender the award of a public service concession such as that in question is not compatible with Community law**.

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<sup>1</sup> Council Directive 92/50/EEC of 18 June 1992 (OJ 1992 L 209, p. 1).

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*Languages available: CS EN FR DE IT PL SK*

*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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