

# Institutionalised Public-Private Partnership as a Mixed Contract under the Regime of the New Directive 2014/24/EU

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*The reformed EU public procurement regime established in Directive 2014/24/EU<sup>1</sup> (further: the Directive) is likely to have the side effect of hindering the development of Institutionalised Public-Private Partnership (IPPP) contracts by introducing uncertainties regarding their classification for the purpose of their tendering and award. Even though a number of simplified rules and procedures were introduced, the issues regarding IPPP contracts' classification and uncertainties raised by recent case law, in particular the Loutraki case and the Oulun kaupunki cases,<sup>2</sup> stay present. Keeping in mind the Commission's policy of promoting IPPP contracts across the EU and the potential of IPPP contracts to deliver better quality, more innovative and punctual projects as well as their ability to secure better value for money, it is argued that such a state of affairs is inadequate. Therefore, the author claims that the Court of Justice and the Commission should recognize IPPP contracts as indivisible mixed contracts and establish requirements that need to be fulfilled for such an indivisibility to be granted.*

## I. Introduction

In recent decades the public-private partnership (PPP) has become a very popular phrase used to describe different types of public-private collaborations. The public consultation on the Green Paper on PPP and Community law on public contracts and concessions<sup>3</sup> showed<sup>4</sup> that there was a considerable need for clarification of the application of these rules to the so-called "institutionalised PPPs" (IPPP).<sup>5</sup> In the widest sense, an IPPP may be described as a form of long-term collaboration between one or more contracting authorities and one or more private entities, based on a co-operation with the objective of achieving public policies through an establishment of a common institution and a concluded contract.

The impact of the world financial crisis placed contracting authorities in a position, where they had to deliver quality public contracts with shrinking budgets. The IPPP provides an alternative model to traditional public contract's delivery focused on securing value for money in contracts that are complex, high-value and spanning over many years.

Although IPPPs are widely used around the world, its legal regulation is in its infancy. There are no spe-

cific provisions regarding IPPPs at the EU level. As the subject matter of the IPPPs regards the delivery of a public task, it will often fulfil the definition of a public contract.<sup>6</sup> Therefore, in cases where the value

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1 Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC.

2 Joined Cases C-145/08 and C -149/08 *Club Hotel Loutraki* [2010] ECR I-4165; Case C-215/09 *Oulun kaupunki* [2010] n.y.r.

3 COM (2004) 327 of 30.4.2004.

4 Communication on Public-Private Partnerships and Community Law on Public Procurement and Concessions, COM (2005) 569, p. 9.

5 Commission's Interpretative Communication on the application of Community law on public procurement and concessions to Institutionalised Public-Private Partnerships (IPPPs), C (2007) 6661, 5 February 2008.

6 Equally often IPPPs will be classified as concessions and as such will be governed by more flexible rules or – as it was until recently – such IPPP concessions will fall outside of the Directive's regime, making the award process of an IPPP concession more efficient, easy and potentially more successful. The legal situation regulating concessions has changed as the new Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts was introduced. Further discussion in this article will regard IPPP contracts qualified as a public contract and the IPPP concessions are delimited from the article's scope.

of an IPPP contract exceeds the set thresholds, the award procedure for the IPPP contract must be in accordance with the provisions of the Directive. However, the fact is that, when IPPPs need to be awarded under the Directive's rules, its characteristics will pose specific legal challenges.

## II. IPPP as an “Extended” Form of a Mixed Contract

An appropriate classification of an IPPP's material scope is crucial, as it will decide whether the contract is excluded from the regime of procurement law or not.<sup>7</sup> The classification may also affect which procurement procedures will be available.<sup>8</sup> Public contracts are usually easy to classify, but in the majority of IPPPs the classification is not as obvious. This is due to the fact that IPPPs usually consist of several elements, such as: work, supply and service as well as other matters not covered by the Directive including the establishment of a common entity and possibly also sale of shares or development of an innovation.

The Directive includes the definition of a mixed contract, which classifies complex public contracts under one set of provisions.<sup>9</sup> A mixed contract must be classified as either a public work, supply or service contract, as a specific contract cannot fall within more than one set of provisions.<sup>10</sup> In order to determine which rules must be used, two measures are applied: the main purpose of a contract and the val-

ue of the individual elements of a contract.<sup>11</sup> The former was developed by the Court of Justice (CJ) due to the absence of accurate and explicit rules in the Directive.<sup>12</sup> The key element to a proper classification of the contract in regard to the concept of main purpose is an adequate distinction between what the main purpose of the contract is and the incidental activities that must take place to deliver the main contract's objective.<sup>13</sup> The need for such a distinction is especially necessary due to the fact that in some cases, parties are interested in grouping various purchases together. The reason for this can be found in the regulation of threshold values. While dealing with a contract which involves service as the main object, but also certain incidental work, a party may be interested in qualifying the specific project as a work contract, since the threshold value is much higher than for service contracts.<sup>14</sup>

The question is how to decide which objective is the contract's main purpose. The answer is not clear. In the *Gestion Hotelera* case<sup>15</sup> the contract was challenged with the claim that it was a work contract; not a service contract. In this case the contract documents stated that it was a contract on managing a casino and hotel and extensive work activities.<sup>16</sup> However, works which should be carried out or provisions for remuneration of the works were nowhere specified. In the light of these circumstances, the CJ ruled that the works were only “*incidental*”, and the main objective of the contract was service. Nevertheless, the CJ did not explain exactly what it meant by “*incidental*”, and how incidental actions should be characterized. It seems reasonable to consider what percentage of the economic value the incidental action has compared to the rest of the contract, and also if it would be possible to deliver the contract's objective without that element. If so it could be arguable that such an element is incidental. Such a line of argumentation is supported by the Commission's interpretative communication which states that the test of main purpose is the preferable manner to distinguish between the aim of the contract and the incidental elements.<sup>17</sup> However, the communication does not elaborate on which characteristics such a test should have.

The fact is that a vast amount of mixed contracts include both supply of goods and services (usually the services will be linked to the goods). Such contracts need to be classified on the basis of the individual value of the contract's elements.<sup>18</sup> Services or

7 Art. 3 of the Directive.

8 Arrowsmith, *The Law of Public and Utilities Procurement*, (London 2005), p. 332.

9 Art. 3 of the Directive.

10 Arrowsmith (fn. 9) p. 331.

11 See: Case C-331/92 *Gestion Hotelera International SA* [1994] ECR I-1329; Joined Cases C-145/08 and C-149/08 *Club Hotel Loutraki* [2010] ECR I-4165.

12 Bovis, *Public Procurement in the European Union*, (Hampshire 2005), p. 192.

13 Case C-220/05 *Jean Auroux v Commune de Roanne* [2007] ECR I-385.

14 Art. 4 of the Directive.

15 Case C-331/92 *Gestion Hotelera International SA* [1994] ECR I-1329.

16 *Ibidem*.

17 Commission's Interpretative Communication on Concessions under Community law, OJ C 121/2, 29 April 2000 pp. 4-5.

18 Art. 3 of the Directive.

supplies covered by a contract must be valued separately to decide which one represents the highest value and thereby defines the whole contract. The value is determined on the basis of the remuneration excluding VAT.<sup>19</sup> Even though this is a mandatory task, it can be a very difficult one. However, a contracting authority needs to be able to prove that it carried out all necessary investigations to obtain information on the objective value of a contract, especially if it comes to the conclusion that the value does not exceed the threshold value stipulated in the Directive.<sup>20</sup>

In the majority of cases, IPPP contracts will fulfill the characteristics of a mixed contract, as they will include different variations of a public contract. However, at the same time IPPPs will also include aspects which are not regulated by the procurement regimes, such as the establishment of a common company. Therefore, until recently it was argued that IPPPs constitute an “extended” mixed contract, where the non-procurement related contractual elements will not only have an impact on the IPPP contract’s classification, they will also make the procurement process even more complicated.<sup>21</sup> This argumentation has found its validation not only in the CJ rulings, but also in the Directive. The provision regarding mixed contracts has been changed, and the changed wording now identifies that in the case of mixed contracts, which include elements covered by the Directive as well as elements which are not, the contracting authorities may choose to award separate contracts for the separate parts or to award a single contract.<sup>22</sup> Where contracting authorities choose to award separate contracts for separate parts, the decision as to which legal regime applies to any one of such separate contracts shall be made on the basis of the characteristics of the separate part concerned.

### III. The Issue of Double Tendering

When dealing with an IPPP contract, the contracting authority may first establish an IPPP with a private partner and then, as a semi-public company, compete against others for the award of the public contract. However, such an approach is not advised by the Commission<sup>23</sup> as double tendering poses the risk that an IPPP will not be awarded the subsequent public contract. In such a case, it is unclear how to proceed. If the IPPP was established only with the purpose to

deliver a particular project, which in the end it did not get, it seems as if the IPPP would need to shift its focus towards different endeavors. In addition, the excessive amount of time and money spent on the organization of two tenders is highly impractical.

#### 1. The *Acoset* case

The issue of double tendering was considered in the *Acoset* case<sup>24</sup> which concerned a co-operation agreement between Provincia Regionale di Ragusa and its municipal councils of south-east Sicily to establish an IPPP. The IPPP’s single corporate purpose was the management of an integrated water service, and it was proposed that the IPPP should be comprised of 49% private share capital. The question referred to the CJ was, whether a contracting authority which wants to award a concession to an IPPP has to organize two tender procedures: one for selecting the minority private shareholder in the IPPP and one to award the concession to an IPPP? Or is one tender procedure with two objectives sufficient?<sup>25</sup>

The CJ emphasised that even though the contract was a service concession and the procurement Directive did not apply, it stated that the award of the contract without a call for tenders would interfere with the objectives of free and undistorted competition and the principle of equal treatment, as it would give the IPPP’s private partner a competitive advantage over other participants of the market.<sup>26</sup> However, the CJ agreed with the Advocate General’s opinion that it would be difficult to require the use of a double procurement procedure, while the procurement system is striving to reduce procedural formalities:

“[...] use of double procedure [...] would be liable to deter private entities and public authorities from forming institutionalized public-private partnerships, on account of the length of time in-

19 Art. 4 of the Directive.

20 *Ibidem*.

21 See fn. 3.

22 Art. 3(4) of the Directive.

23 Fn. 6.

24 Case C-196/08 *Acoset* [2009] ECR I-9913.

25 *Ibidem* para 27.

26 Fn. 25, para 56.

volved in implementing such procedures and the legal uncertainty attaching to the award of the concession to the previously selected private participant.<sup>27</sup>

Such an approach is reasonable, and the interpretation of rules should be accounted as positive, as it takes into consideration not only the EU policies of PPPs' promotion and the aim of simplifying the procurement framework, but also the needs for the law to be practical and efficient in a way that is helpful in practice. Nevertheless, it is debatable, whether the CJ could have reached a different conclusion, since there is no provision in the Directive prohibiting the contracting authority to integrate other proceedings into the procurement procedure. In other words, the CJ defined that the contracting authority can use one procedure for more than one objective as long as procurement law is respected.<sup>28</sup>

## 2. Comments

The *Acoset* case clarified that, in cases of mixed contracts including the establishment of an IPPP and the delivery of a contract, contracting authorities should strive to apply one procedure for the award of both elements at the same time.<sup>29</sup> However, the ruling poses some challenges in its application to different procurement scenarios. That is due to the fact that in the *Acoset* case both the service concession and the establishment of an IPPP were governed by the Treaty provisions. In this sense, the contracting authority had only one set of rules to apply.

When applying the *Acoset* judgment to a scenario where an IPPP contract would be classified as a public contract and the governing framework would be the Directive, the contracting authority would need to deal with two levels of rules.<sup>30</sup> Contrary to the flexible approach towards selecting the IPPP's partner

which would be provided by the Treaty provisions, the subsequent award of a public contract to the IPPP would need to be procured within the framework of the Directive. This requirement is a challenge with the level of detail in itself. In addition, the Directive provides specific procedures and requirements that need to be applied when awarding the contract, which may pose certain legal challenges in the application of the *Acoset* judgment. That is due to the fact that the Directive is strictly concentrated on the public contract. Therefore, it is uncertain, whether additional questions and requirements not relating to the procurement issue, but rather to the selection of an adequate partner to the IPPP, would be allowed. The following sections identify some of the potential uncertainties and challenges that may occur in the framework of the Directive when procuring a contract with two objectives in one procedure.

### a. Conditions for the Performance of a Contract

Article 70 of the Directive gives the contracting authority considerable freedom in laying down terms and conditions for the contract performance. The provision limits the contracting authority to ensure that the terms and conditions for the performance are ancillary to the subject matter of the contract. These conditions may include economic, innovation-related, environmental, social or employment-related considerations. The provisions regarding performance conditions confirm the principle established in the *Beentjes* case.<sup>31</sup> In this case, a contract requirement providing that a certain percentage of the workforce of the successful bidder should be taken from the ranks of the long-term unemployed was authorized. The issues that the author would like to put forward in regard to the conditions of the contract performance are very different, but relevant for an IPPP contract. To be exact, at issue is whether it is possible for the contracting authority to lay down conditions which would specify how decisions regarding contract performance need to be made in an IPPP. For example, such conditions could state that the decisions in the IPPP will be made by the board of shareholders/directors using a simple majority vote or by providing executive, decision-making power to the IPPP chief executive officer.

The provision requires for the conditions to be indicated beforehand in the call for competition or in the procurement documents. Keeping in mind the

27 See: fn. 25, para 61.

28 Art. 3 of the Directive.

29 As well as fn. 6, para 6.

30 Arrowsmith, "Public Private Partnerships and the European Procurement Rules: EU Policies in Conflict?" 37 CML Rev. (2000), p. 711, Braun, *The Practical Impact of E.U. Public Procurement Law on PFI Procurement Practice in the United Kingdom*, the thesis submitted to the University of Nottingham in October 2009, p. 3.

31 Case C-31/87 *Gebroeders Beentjes BV* [1988] ECR I-4635.

specifics and standardisation of the contract notice it would be difficult to incorporate such conditions into it. That is due to the limited word space in a contract notice, and to how it is designed specifically for purposes of procurement law. Another option would be to include the mentioned conditions in the specification of an IPPP contract. However, the rights of parties or method of concluding decisions in an IPPP may be part of the negotiation process, which will occur after the specification is drafted. Therefore, it would be very difficult to include any statements in this regard in the specification.

Lastly, the conditions of the contract performance are restrained to the subject matter of the contract.<sup>32</sup> Therefore, the availability of contract performance conditions relating to the corporate aspect of the IPPP will depend on whether the subject matter will be understood as a whole IPPP contract or only as its purchasing part which is regulated by the Directive.

#### b. Qualitative Selection of Bidders

The provisions of chapter III, section 3 of the Directive are of special importance for the award of the IPPP contract, since they reflect upon standards and requirements that participants of the tender need to fulfill. In other words, these provisions will regulate the selection of preferred bidders for an IPPP. Article 57 establishes a list of reasons for the exclusion of a bidder from the tender procedure. As the exclusions regard the personal situations of the bidders, it seems that they could successfully be applicable not only to procurement contracts, but also to the contractual set-up of the IPPP. This is due to the fact that Article 57 does not include the limitation of being related to the “*subject matter*” of the contract that other provisions relating to the selection of bidders include. In this sense, Article 57 helps to combine the establishment of an IPPP and the subsequent award of a public contract into one better integrated procurement procedure.

The other rules regarding the selection criteria in connection with the minimum capacity levels, economic and financial standing of the bidder and the technical and/or professional ability (Article 58) of the bidder pose more challenges. The reason is that the Directive demands for these provisions to be proportionate and related to the “*subject matter*” of the contract.<sup>33</sup> The question is whether it is possible to take into consideration the entire IPPP contract in-

cluding the company element, or whether only the part which is governed by the Directive may be understood as the “*subject matter*”. This issue is very important, as the contracting authority will be at risk of applying disproportionate measures, if it is not allowed to apply measures proportionate from the perspective of a whole IPPP contract. It also may be in conflict with other rules of section 3 of the Directive. Therefore, it is not just a question of proportionality, but also of being at risk of applying forbidden considerations or criteria.

The traditional understanding of the “*subject matter*” in the available case law<sup>34</sup> and literature mainly refers to “*the thing which is to be purchased*”.<sup>35</sup> In other words, the subject matter relates solely to the procurement law aspect. The issue of “*subject matter*” is usually elaborated on from the perspective of the award of the contract, where the award criteria need to relate to the economic value<sup>36</sup> of the “*subject matter*”.<sup>37</sup>

With regard to the selection stage, it is usually pointed out that the qualitative selection of bidders aims at identifying the best bidder who can perform the awarded contract. If the criteria do not relate to the contract objective, it will violate the equal treatment principle.<sup>38</sup> For example, if the selection criteria would be based on the bidders’ turnover, when all of the bidders have a turnover that exceeds what is reasonably required to deliver the particular public contract, such criteria could potentially violate the mentioned equal treatment principle.<sup>39</sup> Therefore, other considerations which are irrelevant from the perspective of the delivery of the public contract, in some cases for example social and environmental considerations, may be counted as “*forbidden considerations*”, even if they relate to the way in which the contract is to be carried out.<sup>40</sup> However, the author would like to point out that the issues, such as the

32 Art. 70 of the Directive.

33 Art. 58 of the Directive.

34 Case C231/03 *Coname* [2005] ECR I-7287.

35 Kunzlik, “From suspect practice to market-based instrument: policy alignment and the evolution of EU law’s approach to “green” public procurement” 3 PPLR (2013), p. 98.

36 Fn. 32, para 19.

37 Fn. 35.

38 Fn. 9, p. 470.

39 *Ibidem*.

40 *Ibidem*.

turnover consideration may be a valuable and important aspect for the selection of the IPPP-entity's partner.

If an interpretation of the rules where only a public contract element which is governed by the Directive is understood as the "*subject matter*" is applied, certain challenges will occur in regard to the selection of an IPPP partner. According to Brown's conclusion in his article where he analyses the *Acoset* case, when the contracting authority chooses the best contract performer in the tender procedure, such a bidder is automatically the best partner for the IPPP.<sup>41</sup> Such a conclusion may be questioned, as the considerations and criteria for choosing a shareholder to a company are broader than when focusing on finding the best contract performer. In this sense, the selection and award criteria relevant for the corporate part of the IPPP contract may be irrelevant for the identification of the best tender and vice versa. For example, when looking for a shareholder in an IPPP, the contracting authority will need to conduct more in-depth due diligence on the entire economic situation of the potential IPPP's private partner. The conclusion of such an excessive due diligence from the perspective of the purchasing contract would be disproportionate. Hence, it will not be possible to include them in the tender as there will not be justification for them from the perspective of the Directive.

Such a strict interpretation of rules makes the procurement of IPPPs complicated and puts the success of the whole project at risk. Therefore, to make the application of one procurement procedure for establishing IPPPs and the subsequent award of public contracts easier,<sup>42</sup> and to meet the commercial reality needs, the author would argue for a wide interpre-

tation of the procurement rules and the understanding of the "*subject matter*" of the contract as a whole IPPP contract.

#### IV. Application of the Main Purpose Concept to an IPPP Contract<sup>43</sup>

To escape the issue of double tendering, contracting authorities applies one procedure for establishment of an IPPP and the subsequent award of the public contract. This matter was analysed by the CJ in the *Loutraki* case,<sup>44</sup> where an interministerial committee decided to privatise the EKP – a casino wholly owned by the Greek State.<sup>45</sup> It was a mixed contract comprising four elements: (1) the transfer of a block of shares in a public casino business, (2) the entrustment of the management of the casino, (3) the execution of a development plan which upgraded the casino premises, and (4) the improvement of the surrounding area.<sup>46</sup> The contractual set-up predicted that the performance of the work would constitute part of the price for the acquisition of 49% of shares in EKP, while the management service had its separate payment arrangement on the basis of which the private partner would receive remuneration of a sum no larger than a scaled percentage of the annual operating profits.<sup>47</sup> At the same time the contract provided the private partner the right to appoint the majority of EKP's board of directors. Therefore, the private partner would manage the IPPP on the basis of the terms and conditions provided in the contract.<sup>48</sup> The national court raised the question whether this contract should be regulated by Directive 2004/18/EC or not. The CJ had never encountered this specific problem, and the question was how it would treat such an IPPP contract.

The basis for classifying the *Loutraki* contract as a mixed one can be found in paragraph 46 of the CJ's ruling, where it states:

"It is apparent from both the detailed points in the order for reference and the classification of the transaction at issue in the main proceedings by the national court that that transaction is a mixed contract".

The CJ also referred to the contract notice which defined the contract as a mixed contract with its parts inseparably linked and formulating an indivisible whole.<sup>49</sup> Consequently, in this case the CJ had no

41 Brown, "Selection of the private participant in a public-private partnership which is entrusted with a public services concession: *Acoset* (Case C-196/08)" 2 PPLR (2010), p. NA 49.

42 Fn. 6.

43 See commentary: McGovan, "Consortia member rights and classification of mix contracts: a note on Club Hotel Loutraki (C-145/08 and C-149/08)" 5 PPLR (2010) pp. N147-179.

44 Joined Cases C-145/08 and C -149/08 *Club Hotel Loutraki* [2010] ECR I-4165.

45 *Ibidem*, para 24.

46 Fn. 45, para 25.

47 Fn. 45, para 25.

48 Fn. 45, para 25.

49 Fn. 45, para 48.

doubts about the nature of the transaction through the investigation conducted by the national court as well as the provided documentation.<sup>50</sup> Nevertheless, the CJ did not state which documents were provided and what information they included.

According to the CJ the main purpose and predominant feature of the *Loutraki's* contract were the most important aspects to analyse, as the contract is always defined by its main purpose, regardless of whether or not the aspect constituting the main object of a mixed contract falls within the scope of the Directive.<sup>51</sup> Moreover, if the main purpose of an IPPP falls outside of the Directive's regime, elements which separately would be subject to public tender will not be under such a requirement as the contract constitutes an indivisible whole, and as such all elements of the IPPP follow the legal qualification of the main purpose of the contract.<sup>52</sup>

Reference was made to two characteristics of the mixed contract qualification. Firstly, that the contract must be qualified on the basis of its main purpose and, secondly that it needs to be inseparable. However, the CJ did not elaborate on the contract's inseparability. It seems reasonable to point out that in the case of complex IPPPs, the contract by definition needs to be inseparable. Indeed, one of the main characteristics of complex PPP contracts is that one contract delivers all elements of the project. It could be argued that an IPPP contract is able to deliver the value for money only by being inseparable.

It is also unclear how the analysis should be carried out – should it first be decided whether the contract is inseparable, or whether the main purpose of the contract should be applied first, and then if the contract falls outside of the scope of the Directive the inseparability test ought to be applied? Considering the aims of the Directive regarding the increase of participation of SMEs in tenders and therefore promotion of dividing big contracts into smaller lots, it could be argued that the severability of the contract should be tested first.

The *Loutraki* contract was classified as a mixed contract with the main purpose of the contract identified as a transfer of the shares and, as such, it fell outside the scope of the Directive 2004/18/EC. The CJ was not in any way explicit with regard to the criteria used when assessing the mixed contract. The main purpose of the analysed contract was identified as a privatization by the sale to the highest bidder of 49% of the shares in EKP.<sup>53</sup> To support its decision, the CJ

emphasised that the income which the bidder would obtain as a shareholder appears to be significantly higher than the remuneration which he would obtain as a service provider. That is due to the fact that the bidder as a shareholder would receive income for an unlimited time, where his management activity would cease after 10 years.<sup>54</sup> It is debatable whether this is a good argumentation as the economic consideration should not solely decide on the character of the contract, as indicated in an earlier case *Commission v Italy*.<sup>55</sup> In this case it was pointed out that it is necessary to objectively examine the entire transaction to which the contract relates to determine the main purpose of a contract. Moreover, the value of the various matters covered by the contract should be just one criterion among others to be taken into account for the purposes of the assessment.<sup>56</sup> In the *Loutraki* case the advocate general gave an opinion supporting this thesis stating that:

“ [...] since the application of the Community directives is triggered at different value thresholds for different types of contract, it cannot be the only criterion, or there could be a danger of manipulation in order to remove certain contracts from the scope of the procurement rules.”<sup>57</sup>

It seems that the CJ took into consideration two trains of thought while deciding upon the main purpose of the *Loutraki* contract. First, it based its decision on findings made by the national court that the main object was sale of shares. Secondly, the CJ supported its decision pointing out that the sale of shares' economic value is the most significant out of all the mixed contract's elements. Unfortunately, no further reasons were given. Nowhere in the judgment is it mentioned, whether the CJ also took other aspects into consideration such as the character of the service or the payment mechanism of the project. As the CJ mainly based its ruling on the national court's find-

50 Fn. 45, para 56.

51 Fn. 45, paras 48-49.

52 Fn. 45, para 50.

53 Fn. 45, para 57.

54 Fn. 45, para 57.

55 Case C-412/04 *Commission v Italy* [2008] ECR I-619.

56 *Ibidem*, paras 48-49.

57 Opinion of AG Sharpston, 29 October 2009 – Joined Cases C-145/08 and C-149/08 *Club Hotel Loutraki* [2010] ECR I-416, para 59.

ings, it would be useful for future cases, if the CJ would elaborate more on the basis on which the conclusion regarding the main purpose was made.

## V. Indivisibility of an IPPP Contract

The main argument of the *Loutraki* ruling was that the contract constituted an indivisible whole of which the aspects relating to the transfer of shares constituted the main purpose of the contract.<sup>58</sup> However, the CJ did not elaborate on what it meant by the ‘inseparability of a contract’ and did not specify when an indivisible contract can be applied, what are the characteristics of an indivisible contract, or the requirements that the contract needs to meet to be inseparable. A further analysis of the indivisibility of contracts was presented in the *Oulun kaupunki* case,<sup>59</sup> where the objective of the IPPP was classified as a public contract governed by Directive 2004/18/EC. To some extent the case had similar circumstances as the *Loutraki* case, but brought a different ruling from the CJ.

In the *Oulun kaupunki* case, the contracting authority established an IPPP with a private partner to provide occupational healthcare and welfare service, mainly and increasingly to private clients.<sup>60</sup> However, for a transitional period of 4 years, the partners undertook to purchase the health service they required as employers from the IPPP to provide to their staff in accordance with national law.<sup>61</sup> The contracting authority was arguing that during that transitional period, it was justified to buy services from the IPPP without establishing a public tender as: (a) the arrangement would safeguard the position of staff

transferring from the public authority; (b) the contract was “*favorable and competitive*” and (c) the IPPP would start its operation on favorable conditions.<sup>62</sup> However, by proceeding in such a manner the contracting authority did not follow the guidelines provided by the Commission in its interpretative communication on IPPPs.<sup>63</sup> According to EU law the creation of an IPPP is not covered as such by the Directive. Nevertheless, it should be acknowledge that it is necessary to ensure that such a capital transaction does not in reality conceal the award to a private partner of contracts which might be considered to be public contracts.<sup>64</sup> The CJ referred to the *Loutraki* case to illustrate that in regard to a mixed contract in which the different aspects are inseparably linked and thus form an indivisible whole, such a contract needs to be examined as a whole.<sup>65</sup>

In the *Oulun kaupunki* case, the CJ found it relevant to examine whether the contract was mixed with parts inseparably linked to each other. To do so, it needed to ascertain whether the part of the contract which constituted the healthcare services for contracting authority’s staff was separable from the rest of the contract. The ruling in this case stated that the contract should have been concluded in accordance with Directive 2004/18/EC. For the CJ it was clear that the contracting authority failed to follow a competitive procedure during the transitional period for the provision of occupational healthcare and welfare services.<sup>66</sup>

To support its decision, the CJ focused on the fact that the contracting authority was expressing its intention to launch a call for tender for the purchase of health service for its staff at the end of the transitional period.<sup>67</sup> In the CJ’s view, that intention constituted an evidence to support the severable nature of the mixed contract.<sup>68</sup> However, the question is whether this intent presents any obligation. It follows from the Directive that there is a possibility to use a procurement procedure voluntarily.<sup>69</sup> Therefore, it is questionable to claim that the contracting authorities’ willingness to conduct a tender procedure in the future is a form of proof regarding the divisible nature of the IPPP contract. Also, the fact that the IPPP has operated since 2008 without the transitional health service aspect in the CJ’s opinion showed a relevant evidence of the divisible nature of the contract.<sup>70</sup>

The main issue in this case was the fact that the contracting authority did not fulfill the Treaty’ oblig-

58 *Ibidem*, para 58.

59 Case C-215/09 *Oulun kaupunki* (2010) n.y.r.

60 *Ibidem*, paras 17-18.

61 Fn. 60, paras 17-18.

62 Fn. 60, para 22.

63 Fn. 6, pp. 1-6.

64 Fn. 4, para 69.

65 Fn. 45.

66 Fn. 60, para 24.

67 Fn. 60, para 23.

68 Fn. 60, para 43.

69 Art. 51(6) of the Directive.

70 Fn. 60, para 44.

ation, when it came to securing transparency and open competition, not to mention that the authority neglected to follow the rules in Directive 2004/18/EC. The contracting authority did not open a competition by any means and did not advertise the intention to conclude an IPPP contract in any form. Finally, it is worth noting that the healthcare service which was the subject matter of the mixed contract was in fact a Part B service, consequently it was a similar situation as in the *Acoset* case. That means that it was a subject of limited application of the procurement rules, so the contracting authority did not need to apply a full public tender scheme, but just needed to secure transparency, equality and open competition. The contracting authority failed to do so.

## VI. Critical Remarks

The *Loutraki* and the *Oulun kaupunki* cases share a range of similarities: both in regard to IPPPs as well as to mixed contracts. However, the results were different in those two cases since the CJ focused on different aspects. In the *Loutraki* case, the CJ predominantly analysed what the main purpose of the contract was, while the aspect of its indivisibility was not elaborated upon in any great detail. On the opposite, in the *Oulun kaupunki* case the CJ mainly investigated the divisibility of the mixed contract without examining its main purpose. Furthermore, in the *Loutraki* case, the CJ did not question the information provided by the national court regarding the contract qualification as being an inseparable one. On the contrary, in the *Oulun kaupunki* case the CJ applied a very strict approach and concluded its own analysis of the contract qualification, stating that the IPPP was a separable contract even though there were factors presenting close links between the contract's elements.<sup>71</sup> In this manner, the CJ took a more active role. However, it seems that it reached a conclusion without arguing why.

The first question is how the CJ should deal with the evidence. On the one hand, respecting the principle of subsidiarity and respecting legal qualification of the national court, the CJ should apply an interpretation of EU law in accordance with the facts presented and the qualification made by the national courts. This view is supported by the opinion of Advocate General Sharpston in the *Loutraki* case who points that the qualification of a contract is the sole

right of national courts.<sup>72</sup> On the other hand, if the case is sent to the CJ with a preliminary question, this means that there is uncertainty when it comes to the interpretation of EU law. With regard to the issue at hand, it is the EU legislator who introduced the definition of mixed contracts, so the interpretation of this expression is within the CJ's competences.

The second question is why the CJ focused on different elements while qualifying the mixed contract. It seems that in the *Loutraki* case, the CJ applied a general rule of the main purpose, while in the *Oulun kaupunki* case it could be argued that the CJ acknowledged the shortcomings and risks of applying solely an analysis of the main purpose of the contract, as many contracts will fall outside the scope of the procurement scheme even if they include large public contracts' elements. Therefore, a more detailed analysis needs to be applied in a form of a contract's inseparability test to provide an appropriate interpretation of the law. This line of thought is supported by the fact that nowhere in the CJ's judgment in the *Oulun kaupunki* case is the main purpose of the contract identified. Furthermore, if to focus solely on the main purpose of the contract in the *Oulun kaupunki* case and apply *per analogiam* the *Loutraki* judgment's logic, where the primary consideration was given to the economic value of specific parts of the contract, it is more than possible to come up with the conclusion that the main purpose of the *Oulun kaupunki* contract was the provision of insurance to private entities, and as such the contract falls outside the scope of the Directive. That is due to the fact that the greater value of providing service to the private entities has been proven by the contracting authority, which submitted estimated turnover of the IPPP for the transitional period of its activity, which was predicted to be approximately 90 million out of which only 18 million were to be the value of services provided to its staff.<sup>73</sup> Therefore, the IPPP in the *Oulun kaupunki* case would earn much more from the provision of insurance to private entities than from supplying the service to the contracting authority. Firstly, because the main focus of the contract was

71 Brown, "The award of public service contract to a public-private joint venture upon its creation: *Mehiläinen v Oulun kaupunki* (C-215/09)" 3 PPLR (2011) para NA70.

72 Fn. 58. para 53.

73 Fn. 58. para 19.

on this activity, which was described as “*chiefly and increasingly*” devoted to private clients. Secondly, because there was no end date of the IPPP itself, and the agreement regarding provision of occupational healthcare and welfare services to the private clients, contrary to the transitional period of 4 years for the provision of public service.

The economic considerations should not be the only factor deciding the main purpose of the contract, but the author believes that bearing in mind other elements such as the character of the particular contract’s elements and the described main intention of the contract, one could come to the same conclusion that the main purpose of the *Oulun kaupunki* case was the provision of service directed to private clients.

## VII. Indivisibility of the Mixed Contract

The problem with the indivisibility of mixed contracts lies in the fact that it is not objectively impossible to prove that these contracts may be divided into parts. Distinct subjects of contracts may be identified (works, supply, service, sale of land, establishment of a common-entity) and distinct payment mechanisms occur very often, as in the *Loutraki* case. Often, separate parties of a particular part of the contract may be identified. Consequently, in the majority of cases it would be possible to separate different parts of a mixed contract. Nevertheless, mixed contracts are established with the purpose to deliver several elements under one contract, often allowing to receive the most competitive terms and conditions for the project. Therefore, it is important while conducting an objective examination of a contract’s divisibility to have the purpose of a mixed contract in mind and to analyse it in the light of that purpose. IPPPs’ main aims will always be to deliver more efficient, better quality projects, safeguard achievements of value for money, while saving taxpayers’ money. This is why it is important not only to decide, whether the parts of an IPPP contract could in fact be separated, but also whether the IPPP will be able to deliver its objective without fulfilling all parts of

the contract. At the same time, it needs to be considered, whether the contracting authority could organise the contract in another way and still maintain the purpose of the contract.

In regard to the indivisibility of the IPPP contract the CJ presented two approaches in the mentioned cases: in the *Loutraki* case, it was more lenient, concluding that the contract constituted an indivisible whole,<sup>74</sup> whereas in the *Oulun kaupunki* case the approach was very strict – Brown even identifies it as harsh<sup>75</sup> – with a conclusion that the contract was separable.

The question is which elements in both the *Loutraki* and *Oulun kaupunki* cases pointed towards indivisibility or divisibility of a contract and what caused the difference in the CJ’s approaches? Were these different circumstances of the cases, or did the CJ take a more active role in law making in the *Oulun kaupunki* case by narrowing down the scope of scenarios in which mixed contracts, such as IPPPs may escape the Directive. To be able to answer these questions, parts of both judgments will be analysed with the aim to establish, which contractual elements were considered, when deciding upon the divisibility of the contracts.

### 1. Contract Notice

In the *Loutraki* case, the CJ referred to a contract notice and the additional notice in which it was established that all elements of the contract are indivisibly linked to each other, and thus form an indivisible whole.<sup>76</sup> These elements had not occurred in the *Oulun kaupunki* case, as there was no advertising form published. The question may be posed of what the value of the contract notice is in the context of a contract qualification. Contract notice is a form of an “*overall teaser*” in the form of a brief standardized note established solely for the purposes of procurement law. It means that contracting authorities publish only a very dense and brief description of the contract and later on, they provide more information to interested parties. Also, it is necessary to consider that the contract notice may be changed only in certain situations, otherwise it would hinder principles of non-discrimination and transparency of the procurement process.

In IPPPs, many aspects of the contract are developed and changed during the procurement process

74 Art. 3(6) of the Directive.

75 Fn. 72.

76 Fn. 45 paras 48-52.

and thereby, the character of the contract may also change. For these reasons, the contract notice needs to be constructed in a very general manner not to trigger an obligation to restart the procurement process. Consequently there is not much space in the contract notice to characterize the IPPP contract and its inseparable nature. Therefore, it seems that providing information about the mixed nature of an IPPP contract in the contract notice will be a statement of the contracting authority's intention, which cannot be used as a form of proof of the inseparability of the contract. As pointed out in the *Oulun kaupunki* case, the intentions of parties are not a sufficient proof to constitute an inseparability of the mixed contract.<sup>77</sup> Therefore, it seems that the sole contract notice cannot be a form of proof of a contract's indivisibility.

Nevertheless, it is advisable to publish a contract notice with expression of the intention to conduct a mixed contract, as even if a contract will not be governed by public procurement, it still will need to fulfill general principles of EU law such as transparency. It follows from the *Telaustria* case<sup>78</sup> that securing transparency requires at least some sort of advertising. It needs to be noted that when a contract is not covered by the Directive, a contract notice according to Treaty' obligations may be even more general and therefore even less appropriate as evidence of the indivisibility of the contract.

It seems that in the *Loutraki* case, it was mainly the "case file" and "conditions in the additional notice" which convinced the CJ that the contract was inseparable.

The additional notice<sup>79</sup> is not strictly regulated by the Directive as the contract notice is. On the one hand, this gives the contracting authority more flexibility and space to elaborate on the specific terms and conditions of the contract, including its indivisibility or other elements not covered by the Directive. In the *Loutraki* case the contracting authority provided detailed information on all parts of the contract, its characteristics and terms governing the contract.<sup>80</sup> It shows that the additional notice may be a more elaborative document – in a comparison with the contract notice – and as such it could be argued that it has a larger chance of being treated as an evidence of the IPPP contract's indivisibility.

On the other hand, the additional notice may introduce uncertainty, as it is unclear which information should be included in the additional notice for

it to be classified as evidence of a contract's inseparability. Advisable would be to provide in an elaborative manner why the contract is to be inseparable, as the inseparability needs to be objective.

## 2. Objective Evidence

In the *Oulun kaupunki* case, the contracting authority argued that the contract is indivisible as the value of the commitment to purchase healthcare from the IPPP during the transitional period was part of its capital contribution to the IPPP, and from an economic perspective that element was a condition for establishing the IPPP in the first place.<sup>81</sup> This argument seems to be crucial, since, in the *Loutraki* case a substantial importance was given to the economic considerations while qualifying the contract. However, in the *Oulun kaupunki* case it was clear for the CJ that the expressed or presumed intention of the IPPP's partners was not sufficient in regard to various contractual aspects being set up as an indivisible mixed contract.<sup>82</sup> They needed to be supported by "objective evidence" capable to justify setting up a single contract, and in the CJ's opinion the contracting authority failed to provide such evidence.<sup>83</sup> Nevertheless, in the *Loutraki* case the application of a test of "sufficient objective evidence" is not mentioned. The question is whether the CJ applied such a test and the ruling is just not presenting it, or whether the qualification of the contract as an inseparable one was done by the national court, and the CJ based its analysis on the national court's qualification of the contract. It seems that the second option occurred. Further guidelines on which objective evidences are sufficient to support the argument of inseparability of the contract seem crucial. In particular, nowhere in the *Loutraki* judgment nor in the *Oulun kaupunki* case does the CJ give examples, or characteristics of which documents or other sources of proof can be

77 Fn. 60, para 39.

78 C-324/98 *Telaustria* (2000) ECR I-10745 at 62.

79 When mentioning additional notice the author also refers to descriptive documents or supporting tender documents.

80 Fn. 45, para 25.

81 Fn. 60, para 20.

82 Fn. 60, para 39.

83 Fn. 60, para 39.

considered as such evidence.<sup>84</sup> The CJ's approach introduces a certain level of legal uncertainty instead of providing guidelines for future contracts and clarifying procurement provisions.

### 3. Payment Structure

From the perspective of the payment, it could be agreed that the mixed contract in the *Loutraki* case could be divided into separate contractual parts. The work part of the contract, including the implementation of a development plan, was financially connected with the sale of shares, as it constituted part of a price payable for the acquisition of 49% of the EKP shares.<sup>85</sup> Nevertheless, there was no link between the provision of services and the sale of the shares. The service part of the contract had its own financial agreement, where the private partner would receive payment for the provided casino management service.

When it comes to the payment mechanisms in the *Oulun kaupunki* case, it is difficult to present any form of analysis as the CJ's ruling does not provide much information. The only certain element is the fact that the commitment to purchase healthcare from the IPPP during the transitional period of four years was part of the contracting authority's capital contribution to the IPPP.<sup>86</sup> The ruling does not mention whether the private partner was paid for its involvement in shares of the IPPP, or in any part by a direct payment made by the contracting authority. If the sale of shares was involved in the *Oulun kaupunki* case, then the scenario from the *Loutraki* case would be repeated.

It seems that the complex financial structure of an IPPP contract may be one of the strongest evidences of the inseparability of the contract. That is due to the fact that IPPPs' ability to deliver the contract in a predicted makeup helps achieving value for money. The mentioned financial makeup includes complex interrelations between parties. In cases of complex IPPPs, the payment structure is rarely designed

in a simple manner in which a private partner provides works/supplies/services and a contracting authority pays for it. Usually, the structure will be much more complex and include such elements as private investment in exchange of lease, rental of specific public assets, accompanied by tax discounts (for example sales tax levied on the transfer of property in goods involved in the execution of works contract or service tax levied on the service portion of an indivisible works contract), sale of shares, allowance of use, exploitation of additional assets or provision of incidental services, followed by partial direct payments by a contracting authority.

The payment mechanism in which it is established that the contract calls for the contracting authority to pay certain sums at certain stages of the mixed contract could potentially constitute an evidence of the IPPP's indivisibility. In such a situation, the IPPP's private partner may stop the work at any stage if not paid accordingly. If such a scenario would occur, the delivery of the whole IPPP contract would be at risk as the project would potentially need to be re-tendered. The latter would cause delays and increases in spending. Therefore, when determining whether a divisible or indivisible contract has been formed, among other factors the terms under which a financial consideration has been provided should be examined. If the IPPP contract provides the consideration in a lump sum, it will usually indicate that the contract is indivisible. If consideration is itemized for each contractual element, it points towards a severable nature of a contract.

The financial exchange of links in IPPPs will be multidimensional and complex. Therefore, it will be difficult to separate one element of the project without it having an impact on the rest of the project. In the author's opinion, if the contracting authority presents tangled payment mechanisms and financial structures of the project, it should be a valid proof to support the thesis of the indivisibility of an IPPP contract.

### 4. Dismantled IPPPs

It is significant to emphasize that in the *Oulun kaupunki* case at a national level, action was brought by the third party who was interested in providing occupational healthcare and welfare services for the employees of the contracting authority.<sup>87</sup> Through

84 As seen in the *Oulun kaupunki* case, documents establishing an IPPP and regulating service delivery as part of a contribution to an IPPP did not constitute sufficient proof.

85 Fn. 45, para 25.

86 Fn. 60, para 18.

87 Fn. 60, para 25.

this action, the contracting authority was temporally restrained from entrusting the implementation of social and healthcare services to the IPPP.<sup>88</sup> In 2008, the contracting authority transferred the municipal entity's activity to the IPPP, excluding the occupational healthcare services provided to its staff.<sup>89</sup> This element, plus the fact that there was an established transitional period of time in which the IPPP would provide service to the contracting authority after which the service would be put to a public tender was the main argument supporting the theory of a severable nature of this contract.<sup>90</sup> As in the CJ's opinion, the IPPP appeared to be able to deal with the impacts which the absence of these services could have on the IPPP's financial position.<sup>91</sup> However, "*being able to survive*" should not be the measure deciding upon indivisibility, or the divisibility of the IPPP contract. The fact is that the *Oulun kaupunki* judgment did not state that even without the public contract, the IPPP was still able to successfully deliver the aims of the contract. It could be argued that without the separated part of the contract, achieving the IPPP goals, in particular securing value for money, would most probably be hindered.

It is worth considering whether the CJ would reach a different conclusion if the IPPP in the *Oulun kaupunki* case would not be able to operate without the provision of service to the contracting authority and would need to be liquidated. It seems that such a scenario would provide a necessary proof of the inseparability of the contract. Also, would it change anything if the transitional period of time for the provision of a public service were different? This could be the case, as in Brown's opinion, the CJ would possibly be more lenient, if the transitional period had been more modest, for example, one or two years.<sup>92</sup> Nevertheless, Brown does not provide a basis for such an assumption. If to agree with Brown, the answer would need to be provided to the question of where the demarcation line should lie between the acceptable omission of the Directive and its prohibition. For this reason, the author is skeptical about Brown's approach. If the aim is to provide clear, transparent procurement rules, following temporary exceptions is risky and should be avoided. After all, there are exceptional circumstances in which the contracting authority is allowed to award a public contract without

opening the competition.<sup>93</sup> If these circumstances do not occur, the interpretation of procurement law which allows its temporary violation is debatable. The interpretation of the rules is blurry and further guidelines for parties to decide upon such a matter should be provided by the Commission.

## VIII. Conclusion

From the above analysis it follows that procurement of IPPPs in the framework of the Directive is very complex and introduces many uncertainties. First of all, the appropriateness of the Directive's procedures to establish an IPPP with two objectives in one process is debatable due to the amount of detailed requirements posed by the framework and the lack of flexibility. Second, the classification of an IPPP contract poses certain challenges. Namely in the *Oulun kaupunki* case the CJ developed that the inseparability of the mixed contract such as IPPPs must be objective. However, until now the CJ did not provide any guidelines as to how the inseparability of the mixed contract may be proven. It follows from the IPPP's characteristics that for it to be able to deliver its aims of achieving better quality, efficiency and value for money, it needs to be delivered in one contract. However, if today a contracting authority wants to conclude an indivisible IPPP contract, it needs to acknowledge the *Loutraki* and the *Oulun kaupunki* judgments. This means that the contracting authority needs to be ready to argue and to provide objective evidence of why the contract is indivisible. It remains unclear how the contracting authority should characterize and design a contract to ensure such a legal qualification. Therefore, it is necessary for the CJ to recognize IPPP contracts as indivisible mixed contracts and establish requirements that need to be fulfilled for such an indivisibility to be granted.

88 *Ibidem*.

89 *Ibidem*.

90 Fn. 72. para NA70.

91 *Ibidem*.

92 *Ibidem*.

93 Art. 32 of the Directive.