

# The Congress of local and regional authorities



## Institutional Committee *Chamber of Local Authorities*

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### **General report on the ability of local authorities to determine their own internal structures** (Articles. 2, 4.1, 4.2, 4.5, 6.1, 9.2 of the European Charter of Local Self-Government)

Consultant: Professor Dian SCHEFOLD

#### **Draft questionnaire**

### **ARMENIA**

**Prepared by David Tumanyan**

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## **A**     Introduction

1. Since 1994, the Congress of Local and Regional Authorities has drafted six general reports on implementation of certain provisions of the European Charter of Local Self-Government (hereafter “the Charter”). The most recent report, in 2005, looked at the consultation of local authorities and their representative associations (CPL (12) 5, rapporteur Mr Calota), resulting in Recommendation 171 (2005).

Since 2003, the Congress has also drafted so-called “second generation” reports on specific policy and institutional aspects of local democracy, less directly linked to the Charter. This work, which is clearly worthwhile, is however something of a drain on the resources available to draw up the general reports. And yet there are a number of outstanding questions on problems directly related to the provisions of the Charter.

2. Among these, the problem of local authorities’ autonomy regarding the way in which they are organised (referred to in particular in Article 6.1 of the Charter) warrants special attention for various reasons.

- First, it should be noted that the principle of regulation exclusively by law requires the organisation of local authorities to be prescribed in the constitution or in statute, either by the central authorities or by the federal and regional states or federated and regional entities (cf Articles 2 and 4.1). However, local authorities must be given the authority to determine their own internal administrative structures in order to adapt them to local needs and ensure effective management (cf Article 6.1). Questions relating to these aspects are submitted below (see below, infra B1).
- Second, the degree of autonomy granted to local authorities regarding the way in which they are organised will impact on the extent of their scope for exercising their initiative in order to fulfil the tasks which central government has neither imposed upon them nor assigned to another authority. Accordingly, the competence of local authorities will depend on their freedom to organise themselves in the most appropriate way (cf Article 4.2 of the Charter). Questions relating to these aspects are submitted below (see below, infra B2).
- The ability of local authorities to determine the way they are organised (as provided for in Article 6 of the Charter) will have a real influence on the ability of the various departments to discharge their duties, particularly in the case of local public services and undertakings fulfilling a public service role. It is essential not only for these services to be organised in an appropriate way, they must also be guaranteed a certain control of the internal organisation of these services in order to provide the most effective response possible to specific local needs and ensure effective management (as required by Article 6.1). Questions relating to these aspects are submitted below (see below, infra B3).
- For European Union member states, one question to be addressed is whether Community law on competition (particularly with regard to public corporations) limits the freedom of choice in organising local services. If this is indeed the case, we need to consider the relationship between such a limitation and the guarantee set out in Article 6.1 of the Charter. In order to better understand the problem, articles 16 and 86 of the European Constitutional Treaty (ECT) and the relevant case-law of the ECJ are enclosed in the appendix. You are invited to give you opinion on these issues (see below, infra B4).

In view of these issues, the Group of Independent Experts decided at its meeting on 2 March 2007, to suggest that the Institutional Committee draft a general report on this matter (CG/INST/GIE (13) PV2, paragraph 50).

## **B.**     **Questions**

1. The principle of regulation exclusively by law and statutory independence

1.1. Does the domestic legislation in your country require the regulations pertaining to local authorities to be laid down in extenso or does it assign to such authorities the power to determine their own administrative structures? If so, what is the extent of this power?

**The Law on Local Self-government of Armenia assigns to local authorities the power to determine their own administrative structures. The head of community/mayor, not later than one month after he/she accepts the office, shall develop and submit for the approval of council the structure of the staff, as well as the structure of the community budgetary institutions. The structural unit of the**

**local authorities` administrative structure can be only “division”, which minimum number of staff members is defined by state authorized body (the Ministry of Territorial Administration). It is defined 5 persons (municipal servants) by the Order of the Minister of Territorial Administration (August 16, 2006).**

1.2. In which of the following areas from are local authorities able to decide on their own regulations (please provide details):

1.2.1. Electoral law, local authority bodies and relations between them, internal organisation of the deliberative body (the elected council)

**Local authorities are able to decide on their own regulation internal organization of the elected council. Community council may establish by its decision permanent or temporary commissions for the implementation of the powers vested to it.**

1.2.2. Internal structure of the municipal authority, organisation of the administrative departments, decisions on the independence of certain structures

**Municipal council by the submission of the head of community/mayor approves the structure of the municipal administration.**

1.2.3. Staff regulations of civil servants and employees of local authorities

**Staff regulation of civil servants (municipal servants) is mainly done by the Law on Municipal Service. Interrelationship between municipal servants is regulated also by regulations approved by the head of municipality in the bases of exemplary regulations defined by the Ministry of Territorial Administration.**

1.2.4. Local authorities` internal decentralisation

**Municipal council by its own decisions may solve internal decentralization issues.**

1.2.5. Other

2. Effects on the definition of tasks

2.1. Does your constitution or legislation contain a list of tasks that local authorities are entitled or obliged to fulfil? If so, please specify the tasks in question.

**The Constitution of Armenia doesn`t contain a list of tasks in question. Tasks are containing in legislation, which are given in point 1.**

2.2. If there is such a list, is it exhaustive or are local authorities able to perform other tasks not specified in the list?

2.2.1 Are local authorities able to decide independently in this regard?

**Local authorities are able to decide independently other tasks only in the framework of provisions under legislation.**

2.2.2 If such is the case, what practical use is made of this possibility?

2.3. Are local authorities able to decide on the legal form under which they intend to fulfil their tasks? In particular:

2.3.1. can they decide that the local authority will deliver all the services directly?

**Yes.**

2.3.2. can they choose to treat certain services as separate and independent entities (for instance, through a company under the control of the local authority)?

**Yes.**

2.3.3. can they set up bodies under public law to perform these tasks?

**The legislation isn't full in this regard. The legislation allows establishing inter-community union (consortia) for performing these tasks, but responsibilities of inter-community unions are not defined by the law. That's why there aren't established inter-community unions yet.**

2.3.4. can they set up bodies under private law to perform these tasks?

**Yes.**

3. Effects on the delivery of local public services

3.1. What are the local public services which, under your country's legislation, local authorities are obliged to manage?

**Local authorities are responsible for managing the following public services:**

- **water supply, sewerage, irrigation and central heating systems;**
- **landscaping and municipality improvement;**
- **use and maintenance of municipality building stock, including residential and non-residential buildings, dormitories, administrative buildings and other municipality-owned structures;**
- **ensuring the proper maintenance of cemeteries;**
- **construction, maintenance and operation of roads, bridges and other engineering structures within the municipality's jurisdiction;**
- **operation of municipality public transport;**
- **waste collection and disposal;**
- **preschool education (kindergartens);**
- **specialized education;**
- **public lighting.**

3.2. What are the public services which local authorities may manage but are not obliged to do so? What conditions apply?

**There aren't other public services which local authorities may manage.**

3.3. In managing a public service, are local authorities entitled to act outside the municipal area? If so, what conditions and what restrictions apply?

**No.**

3.4 Have the local authorities the right to manage public services of general interest or are local authorities obliged to proceed through an invitation to tender for general interest services, and if so, what conditions apply?

**Local authorities have the right to manage public services of general interest (see point 3.1).**

3.5. Are local authorities entitled to exercise economic activities even where such activities do not have a public service aim? If such is the case, under what forms (through a state or local authority controlled company ? or through a private company ? etc.)

**Local authorities are entitled to exercise economic activities through their fully or partly controlled company but only for the implementation of their responsibilities.**

3.6. Are the local authorities free to draw up the staff regulations the civil servants or of the employees who carry out local public services?

**Yes. Head of community approves by-laws of staff, as well as of the budgetary institutions and non-commercial organizations of the community.**

4. Effects of Community law on the structures of local authorities (concerns only European Union member states; nonetheless non-EU members are warmly invited to make any observations on these questions)

4.1. Under your domestic legislation, are local public services considered as coming under the scope of Article 86 of the European Community Treaty (ECT)?

4.2. Does your domestic legislation, as interpreted by your national jurisdictions, consider local public services to be guaranteed by Article 16 of the ECT and therefore exempt from the scope of Article 86 ECT?

4.3. Does the performance of public service tasks fall within the scope of the particular tasks as referred to in Article 86.2 ECT?

4.4. Is one to conclude that Article 86 ECT entails an obligation to separate local public services from the administrative structures of local authorities or to privatise them?

4.5. Is there any debate in your country on the relationship between the application of Article 86 ECT to local public services and the guarantee of local authorities' ability to adapt internal administrative structures to local needs as set out in Article 6.1 of the Charter?

## Treaty establishing the European Community (TEC)

### *Article 16 (introduced by the Treaty of Amsterdam)*

“Without prejudice to Articles 73, 86 and 87, and given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Community and the Member States, each within their respective powers and within the scope of application of this Treaty, shall take care that such services operate on the basis of principles and conditions which enable them to fulfil their missions.”

### *The Treaty of Lisbon adds the following sentence:*

“The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish these principles and set these conditions without prejudice to the competence of Member States, in compliance with the Treaties, to provide, to commission and to fund such services.”

### *Article 86 (ex Article 90)*

“1. In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular to those rules provided for in Article 12 and Articles 81 to 89.

2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community.

3. The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States.”

## **Article 86 TEC and the autonomy granted to local authorities regarding the way in which they are organised**

### **Relevant case-law of the Court of Justice of the European Communities (ECJ)**

1. *Content:* Article 86-1 TEC is addressed to Member States. Under the case-law of the ECJ, that includes the authorities of other territorial entities as well.<sup>1</sup>

The relevant judgment states that “*the communes are covered by the situation referred to in Article 90 ( 1 ) of the Treaty. That provision governs the obligations of the Member States - which includes, in this context, the public authorities at the regional, provincial or communal level - towards undertakings "to which (( they )) grant special or exclusive rights"*.”<sup>2</sup>

According to ECJ case-law, the exception contained in Article 86-2 TEC seeks “*to reconcile the Member States’ interest in using certain undertakings, in particular in the public sector, as an instrument of economic or fiscal policy with the Community’s interest in ensuring compliance with the rules on competition and the preservation of the unity of the Common Market.*”<sup>3</sup>

The concept of an undertaking, which is important for municipal organisations and for interpreting Article 86, is not defined in terms of its legal status or the way in which it is financed, the ECJ having consistently held that “*the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed.*”<sup>4</sup>

\* The author is indebted to Ms Janna Koeke (Bremen) for her help in preparing these appendices.

<sup>1</sup> ECJ, Case 30/ 87 *Bodson*, Rec. 1988, p. 2479, paragraph 33, clarifying the scope of Article 86-1 TEC, extending it to French regions, departments and communes.

<sup>2</sup> Likewise, the Commission directive which is based on Article 86 of the TEC, Directive 2000/52/EC of 26 July 2000, OJ L 193/75, amending Directive 80/723/EEC of 25 June 1980, OJ L 195/ 35 on the transparency of financial relations between Member States and public undertakings, refers to public authorities “including the State and regional, local and all other territorial authorities”.

<sup>3</sup> ECJ, Case 202/ 88, *France / Commission*, Rec. 1991 p.I-1223, paragraph 12.

<sup>4</sup> Consistent case-law of the ECJ, Case 41/ 90, *Höfner*, Rec 1991, page I-1979, paragraph 21; Case 244/94, *Fédération française des sociétés d’assurance*, Rec. 1995, p. I-4013, paragraph 14; Case -55/96, *Job Centre coop*, Rec. 1997, p. I-7119, paragraph 21; Cases 159/91 and 160/91 *Poucet and Pistre*, Rec. 1993, p. I-637, paragraph 17.

In the field of social security, the ECJ has ruled that there is no economic activity in cases where the body in question is non-profit-making and fulfils an exclusively social function (e.g. sickness insurance fund) and if several concurrent criteria are met.<sup>5</sup> If only some of these criteria are met, the ECJ considers the institutions to be “undertakings engaging in economic activity”.<sup>6</sup> In this case-law on social security systems, the ECJ does not apply the exceptions under Article 86-2 TEC, but refuses to recognise the bodies in question as undertakings for the purpose of the Treaty competition rules.

In addition, Article 86 contains a third paragraph which grants the Commission the power to ensure, in the performance of its duties, that Member States apply the provisions of the article, and, where appropriate, to address appropriate directives or decisions to Member States. Where the Commission issues directives or decisions, these must be appropriate to the duty of surveillance imposed upon it by that paragraph.<sup>7</sup> The Commission has exercised its power to issue directives under Article 86-3 in only two areas: first, in the field of telecommunications, where several directives have been issued over the past two decades<sup>8</sup>, and second with respect to transparency.<sup>9</sup>

As regards the power conferred by Article 86-3 on the Commission to adopt decisions in specific cases, this has been exercised several times in areas other than those cited above.

2. *Who decides?* The ECJ initially considered that the assignment of special tasks should not be left to Member States’ national law and that it was for the Commission to confer such tasks. The national courts did not have the right, therefore, to apply Article 86-2 directly.<sup>10</sup> In 1989, however, the ECJ changed its case-law, taking the view that where the Commission failed to act, Article 86-2 was directly applicable and that Member States and undertakings could rely on this exception before their national courts.<sup>11</sup> The conditions on which competition may be restricted under Article 86-2 were spelt out in the *Copenhagen* judgment<sup>12</sup> where, for the first time, the ECJ recognises that the rules laid down in Article 86-2 may justify, in this particular case, granting an exclusive right to municipal undertakings in the utilisation of waste (see paragraphs 74-83). Restrictions on competition may therefore be justified if they are necessary for the performance of a task serving the general economic interest.<sup>13</sup> The *Commission v. France* judgment, moreover, is concerned specifically with undertakings providing municipal public services:<sup>14</sup>

*“57. It must also be borne in mind that, in Almelo, cited above (paragraph 48), the Court accepted, with respect to a regional undertaking entrusted with electricity distribution, that the uninterrupted supply of electricity throughout the territory in respect of which the concession is granted to all consumers, whether local distributors or end-users, in sufficient quantities to meet demand at any given time, at uniform tariff rates and on terms which may not vary save in accordance with objective criteria applicable to all customers, is a task of general economic interest within the meaning of Article 90(2).*

*58. Similarly, the Commission, in its Decision 91/50/EEC of 16 January 1991 relating to a proceeding under Article 85 of the EEC Treaty (IV/32.732 - IJsselcentrale and others) (OJ 1991 L 28, p. 32) has already recognized that an undertaking entrusted with the main task of ensuring the reliable and efficient operation of the national electricity supply at costs which are as low as possible and in a socially responsible manner provides services of general economic interest within the meaning of Article 90(2).*

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<sup>5</sup> ECJ, Cases 264/01, 306/01, 354/01 and 355/01, *AOK Bundesverband and Others*, Rec. 2004, p. I-2493, paragraph 47. See also ECJ Cases 159/91 and 160/91 *Poucet and Pistre*, Rec. 1993, p. I-63, paragraphs 15 and 18.

<sup>6</sup> ECJ, Cases 264/01, 306/01, 354/01 and 355/01, *AOK Bundesverband and Others*, Rec. 2004, p. I-2493, paragraph 49, with reference to the ECJ, Case 244/94, *Fédération française des sociétés d’assurance*, Rec. 1995, p. I-4013, paragraph 22, and Case 67/96, *Albany*, Rec. 1999, p. I-5751, paragraphs 84 to 87.

<sup>7</sup> ECJ, Cases 188-190/ 80, *France and Others/ Commission*, Rec. 1982, p. 2545, paragraph 13.

<sup>8</sup> Directive 88/301/EEC of 16 May 1988 on competition in the markets in telecommunications terminal equipment, OJ L 131/ 73, and Directive 90/388/EEC on competition in the markets for telecommunications services, OJ L 192/ 10, and the directives amending Directive 90/388/EEC. See also Directive 90/388/EEC – the amending directives were repealed by Directive 2002/77/EEC of 16 September 2002, OJ L 249/ 21 on competition in the markets for electronic telecommunications networks and services.

<sup>9</sup> Directive 2000/52/EC of 26 July 2000, OJ L 193/75, amending Directive 80/723/EEC of 25 June 1980, OJ L 195/ 35 on the transparency of financial relations between Member States and public undertakings.

<sup>10</sup> ECJ, Case 10/71, *Port de Mertert*, Rec. 1971, p. 723, paragraph 16.

<sup>11</sup> ECJ, Case 66/86, *Ahmed Saeed Flugreisen*, Rec. 1989, p. 803, paragraph 53. *The ECJ places the Commission under a duty to ensure the application of the provisions of Article 90 and to address, where necessary, appropriate directives or decisions to Member States; it does not, however, preclude the application of paragraphs (1) and (2) of that article where the Commission fails to act.*

<sup>12</sup> ECJ, Case 209/ 98, *Copenhagen*, Rec. 2000, p. I- 3743.

<sup>13</sup> ECJ, Case 209/ 98, *Copenhagen*, Rec. 2000, p. I-3743, paragraph 81.

<sup>14</sup> ECJ, Case 159/ 94, *Commission/ France*, Rec. 1997, p. I-5815, paragraph 57-59.

59. *It must therefore be concluded that, for the Treaty rules not to be applicable to an undertaking entrusted with a service of general economic interest under Article 90(2) of the Treaty, it is sufficient that the application of those rules obstruct the performance, in law or in fact, of the special obligations incumbent upon that undertaking. It is not necessary that the survival of the undertaking itself be threatened.*"

3. *Principles governing interpretation:* Article 86-2 TEC establishes a rule limiting competition. This rule must be interpreted strictly.<sup>15</sup>

In addition, any Member States wishing to invoke this exception must show that the concurrent conditions have been met.<sup>16</sup> Article 86-2 is applicable, so the competition rules do not apply if their application "obstruct(s) the performance, in law or in fact" of the task assigned to the undertakings entrusted with that task. It is not necessary that the survival of the undertaking itself be threatened.<sup>17</sup> In the opinion of Mr Schink, however, the fact that performance of the task is merely rendered more difficult is not a sufficient condition.<sup>18</sup>

In *Commission v France* and *Commission v Netherlands*, the power of Member States to define services of general economic interest was made clear. See, for example, *Commission v Netherlands*.<sup>19</sup>

"39. Moreover, in Case C-202/88 *France v Commission* [1991] ECR I-1223, paragraph 12, the Court held that, in allowing derogations to be made from the general rules of the Treaty in certain circumstances, Article 90(2) seeks to reconcile the Member States' interest in using certain undertakings, in particular in the public sector, as an instrument of economic or fiscal policy with the Community's interest in ensuring compliance with the rules on competition and the preservation of the unity of the common market.

40. *The Member States' interest being so defined, they cannot be precluded, when defining the services of general economic interest which they entrust to certain undertakings, from taking account of objectives pertaining to their national policy or from endeavouring to attain them by means of obligations and constraints which they impose on such undertakings.*"

The conditions contained in Article 86-2 are considered to have been met if the maintenance of the undertakings' exclusive rights is necessary for the performance of general interest tasks under economically acceptable conditions. In this respect, the *Corbeau* judgment states as follows<sup>20</sup>:

" 14. *That latter provision thus permits the Member States to confer on undertakings to which they entrust the operation of services of general economic interest, exclusive rights which may hinder the application of the rules of the Treaty on competition in so far as restrictions on competition, or even the exclusion of all competition, by other economic operators are necessary to ensure the performance of the particular tasks assigned to the undertakings possessed of the exclusive rights.*

15. *As regards the services at issue in the main proceedings, it cannot be disputed that the Régie des Postes is entrusted with a service of general economic interest consisting in the obligation to collect, carry and distribute mail on behalf of all users throughout the territory of the Member State concerned, at uniform tariffs and on similar quality conditions, irrespective of the specific situations or the degree of economic profitability of each individual operation.*

16. *The question which falls to be considered is therefore the extent to which a restriction on competition or even the exclusion of all competition from other economic operators is necessary in order to allow the holder of the exclusive right to perform its task of general interest and in particular to have the benefit of economically acceptable conditions.*"

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<sup>15</sup> ECJ, Case 157/94, *Commission/Netherlands*, Rec. 1997, p. I-5699 paragraph 37 "Being a provision permitting derogation from the Treaty rules, Article 90(2) must be interpreted strictly"; ECJ, Case 159/94, *Commission/ France*, Rec. 1997, I-5815, paragraph 53.

<sup>16</sup> ECJ, Case 157/ 94 *Commission/ Netherlands*, Rec. 1997, p. I-5699, paragraph 51; ECJ, Case 159/ 94, *Commission/France*, Rec. 1997, p. I-5815, paragraph 94.

<sup>17</sup> ECJ, Case 157/ 94, *Commission/Netherlands*, Rec. 1997, p. I-5699, paragraph 43: "It must therefore be concluded that, for the Treaty rules not to be applicable to an undertaking entrusted with a service of general economic interest under Article 90(2) of the Treaty, it is sufficient that the application of those rules obstruct the performance, in law or in fact, of the special obligations incumbent upon that undertaking. It is not necessary that the survival of the undertaking itself be threatened."

See also ECJ Case 159/94, *Commission/ France*, Rec. 1997, p. I-5815, paragraph 59, which confirms this case-law.

<sup>18</sup> Schink, *Kommunale Daseinsvorsorge in Europa*, Deutsches Verwaltungsblatt 2005, p. 867.

<sup>19</sup> ECJ, Case 157/94, *Commission/ Netherlands*, Rec. 1997, p. I-5699, paragraphs 39-40; see also ECJ, Case 159/ 94, *Commission/ France*, Rec. 1997, p. I-5815, paragraphs 55-56.

<sup>20</sup> ECJ, Case 159/ 94 *Commission/ France*, Rec. 1997, p. I-5815, paragraph 96; ECJ Case 320/ 91, *Corbeau*, Rec.1993, p. I-2533, paragraphs 14-16.

Exemptions to the competition rules are not normally permitted unless they are “necessary for performance of the particular tasks assigned to an undertaking entrusted with the operation of a service of general economic interest”. According to the ECJ, this arises from the wording of Article 86-2.<sup>21</sup>

4. *Aid and calls for tenders*: Aid and calls for tenders are not major issues here. As regards aid, Article 86-2 plays a more modest role than before.<sup>22</sup> Consider for example the “*Ambulanz Glöckner*” case<sup>23</sup> in which Article 86-2 TEC is specifically mentioned. As regards calls for tenders issued by municipalities and the resultant restrictions on the freedom of municipalities to organise themselves, the ECJ set strict limits in *Teckal*<sup>24</sup> and in *Stadt Halle v RPL Recyclingpark Lochau GmbH*.<sup>25</sup> Even if there is no formal call for tenders, judicial protection must be afforded in order to ensure the application of the relevant Community rules “*even though that application is mandatory where the conditions of application are satisfied. Such an option could lead to the most serious breach of Community law in the field of public procurement on the part of a contracting authority.*”<sup>26</sup> It must be ensured that “*review procedures are available at least to any person having or having had an interest in obtaining a public contract who has been or risks being harmed by an alleged infringement.*”<sup>27</sup> Municipalities are bound to apply Directive 93/36/EEC coordinating procedures for the award of public supply contracts and to carry out the respective award procedures, “*in the case where a contracting authority plans to conclude a contract for pecuniary interest with an entity which is legally distinct from it, whether or not that entity is itself a contracting authority.*”<sup>28</sup>

The *Stadt Halle/ RPL Lochau* judgment further states that: “*A public authority which is a contracting authority has the possibility of performing the tasks conferred on it in the public interest by using its own administrative, technical and other resources, without being obliged to call on outside entities not forming part of its own departments. In such a case, there can be no question of a contract for pecuniary interest concluded with an entity legally distinct from the contracting authority. There is therefore no need to apply the Community rules in the field of public procurement.*”<sup>29</sup>

Likewise, there may be other circumstances in which a call for tenders is not mandatory, even though the other contracting party is an entity legally distinct from the contracting authority. In such cases, however, it is necessary that the contracting authority exercise “*over the separate entity concerned a control which is similar to that which it exercises over its own departments*” and that that entity carry out “*the essential part of its activities with the controlling public authority or authorities.*”<sup>30</sup>

5. *Current trend*: In 2007, the ECJ gave three judgments in which it provided a restrictive application of the principles mentioned, but without stating the reasons therefor.<sup>31</sup> In the *Rüffert* case, the Advocate General, Yves Bot, had argued in his opinion that a restriction on the freedom to provide services could be justified by overriding reasons relating to the public interest and that such reasons included the protection of workers.<sup>32</sup> The ECJ, while reiterating in its judgment the importance of worker protection, did not explain why such protection would be afforded only in the context of public works, whereas in the case of private contracts, no such protection exists.<sup>33</sup> For that reason, territorial entities are no longer entitled to make their contracts conditional on the observance of minimum social standards and are thus greatly hampered.

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<sup>21</sup> ECJ Case: 159/ 94, *Commission/France*, Rec.1997, p. I-5815, paragraph 54.

<sup>22</sup> Colneric, Ninon, Dienstleistungen von allgemeinem Interesse in der neueren Rechtsprechung des CJCE, in: FS Zuleeg, 2005, S. 437.

<sup>23</sup> ECJ, Case 475/ 99, *Ambulanz Glöckner*, Rec. 2001, p. I-8089.

<sup>24</sup> ECJ, Case 107/98, *Teckal*, Rec. 1999, p. I-8121.

<sup>25</sup> ECJ, Case 26/03, *Stadt Halle and RPL Lochau*, Rec. 2005, p. I-1.

<sup>26</sup> ECJ, Case 26/03, *Stadt Halle and RPL Lochau*, Rec. 2005, p. I-1, paragraph 37.

<sup>27</sup> ECJ, Case 26/03, *Stadt Halle and RPL Lochau*, Rec. 2005, p. I-1, paragraph 40.

<sup>28</sup> ECJ, Case 26/03, *Stadt Halle and RPL Lochau*, Rec. 2005, p. I-1, paragraph. 47, with reference to the ECJ Case 107/98, *Teckal*, Rec. 1999, p. I-8121, paragraphs 50 and 51.

<sup>29</sup> ECJ, Case 26/03, *Stadt Halle and RPL Lochau*, Rec. 2005, p. I-1, paragraph 48.

<sup>30</sup> ECJ, Case 26/03, *Stadt Halle and RPL Lochau*, Rec. 2005, p. I-1, paragraph 49, see also ECJ Case 107/98, *Teckal*, Rec. 1999, p. I-8121, paragraph 50.

<sup>31</sup> Cf. the following judgments: ECJ Case, *Viking*, 438/05, 11 December 2007; ECJ Case 341/ 05, *Laval*, 18 December 2007, ECJ, Case 346/06 *Rüffert*, 20 September 2007.

<sup>32</sup> ECJ, Case 346/06, *Rüffert*, Opinion of Advocate General, Yves Bot, 20 September 2007, paragraphs 105 and 106.

<sup>33</sup> ECJ, Case 346/06 *Rüffert*, 20 September 2007, paragraphs 39 and 40.

Similarly, in *Laval* and *Viking*, the ECJ, while confirming that worker protection is a justified interest, states “that a restriction on freedom of establishment can be accepted only if it pursues a legitimate aim compatible with the Treaty and is justified by overriding reasons of public interest. But even if that were the case, it would still have to be suitable for securing the attainment of the objective pursued and must not go beyond what is necessary in order to attain it”.<sup>34</sup> In these particular cases, the two collective measures, a blockade and strike action, could not be justified.

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<sup>34</sup> ECJ Case *Viking*, 438/05, 11 December 2007, paragraph 75, which refers to Case 55/94 *Gebhard*, Rec.1995, p I-4165, paragraph 37 and ECJ Case 415/ 93 *Bosman*, Rec. 1995, p. I-4921.