Questions referred

1. Can Article 45(2)(d) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, ([1]) which states that '[a]ny economic operator may be excluded from participation in a contract where that economic operator. has been guilty of grave professional misconduct proven by any means which the contracting authorities can demonstrate', in conjunction with Articles 53(3) and 54(4) of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, ([2]) be interpreted as meaning that it is possible to regard as culpable professional misconduct a situation in which the contracting authority concerned annulled, terminated or renounced a public contract with the economic operator concerned owing to circumstances for which that operator is responsible, where the annulment, termination or renouncement occurred in the three-year period before the procedure was initiated and the value of the non-performed part of the contract amounted to at least 5 % of the contract's value?

2. If Question 1 is answered in the negative — if a Member State is able to introduce grounds, other than those listed in Article 45 of Directive 2004/18/EC, for excluding economic operators from participation in a procedure for the award of a public contract, which it considers to be essential for the protection of the public interest, the legitimate interests of the contracting authorities and the maintenance of fair competition between economic operators, is it possible to consider consistent with that directive and the Treaty on the Functioning of the European Union a situation involving the exclusion of economic operators with which the contracting authority concerned annulled, terminated or renounced a public contract owing to circumstances for which that economic operator is responsible, where the annulment, termination or renouncement occurred in the three-year period before the procedure was initiated and the value of the non-performed part of the contract amounted to at least 5 % of the contract's value?

([1]) OJ 2004 L 134, p. 114.
([2]) OJ 2004 L 134, p. 1.

Reference for a preliminary ruling from the Gerechtshof Amsterdam (Netherlands) lodged on 23 September 2011 — D.F. Asbeek Brusse, K. De Man Garabito v Jahani BV

(Case C-488/11)

(2012/C 13/06)

Language of the case: Dutch

Referring court

Gerechtshof Amsterdam

Parties to the main proceedings

Applicants: Dirk Frederik Asbeek Brusse, Katarina De Man Garabito

Defendant: Jahani BV

Questions referred

1. Should a person who lets residential premises on a commercial basis and who lets a residential property to an individual be deemed to be a seller or supplier within the meaning of the Directive? ([1]) Does a tenancy agreement between a person who lets residential premises on a commercial basis and a person who rents such premises on a non-commercial basis fall within the scope of the Directive?

2. Does the fact that Article 6 of the Directive must be regarded as a provision of equal standing to national rules which rank, within the domestic legal system, as rules of public policy, mean that, in a dispute between individuals, the national transposition measures with regard to unfair contractual terms are a matter of public policy, so that the national court is competent and obliged, both in first-instance proceedings and in appeal proceedings, of its own motion (and thus also outside the ambit of the grounds of complaint), to assess a contractual term against the national transposition measures and to find that term to be void if it comes to the conclusion that the term is unfair?

3. Is it compatible with the practical effect of Community law that the national court does not refrain from applying a penalty clause which must be deemed to be an unfair contractual term within the meaning of the Directive, but, by the application of national legislation, merely mitigates the penalty, in a case where an individual has invoked the mitigation powers of the court, but not the voidability of the term concerned?

([1]) Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29).

Appeal brought on 26 September 2011 by Fuchshuber Agrarhandel GmbH against the order of the General Court (Second Chamber) delivered on 21 July 2011 in Case T-451/10 Fuchshuber Agrarhandel GmbH v Commission

(Case C-491/11 P)

(2012/C 13/07)

Language of the case: German

Parties

Appellant: Fuchshuber Agrarhandel GmbH (represented by: G. Lehner, Rechtsanwalt)

Other party to the proceedings: European Commission

Form of order sought

The appellant claims that the Court should:

— conduct a hearing;

— order the European Commission to pay the appellant within 14 days the sum of EUR 2 623 282,31, together with interest of 6 % per annum on the sum of EUR 1 641 372,50 from 24 September 2007 and interest of 6 % per annum on the sum of EUR 981 909,81 from 16 October 2007;

— declare that the European Commission is obliged to compensate the appellant for any further losses in connection with lot KUK459 awarded on 3 September 2007 and lot KUK465 awarded on 17 September 2007;

— rule that the European Commission is to pay the appellant's costs to the appellant's lawyer within 14 days.

Pleas in law and main arguments

The appeal is directed against an order of the General Court, by which it dismissed, due to lack of any foundation in law, an action for damages in respect of the loss allegedly incurred by the applicant and appellant because the Commission did not check the conditions for the implementation of standing invitations to tender for the resale on the Community market of cereals, in this case maize, held by the Hungarian intervention agency.

The General Court's interpretation of the law, according to which the Commission cannot be accused of any unlawful conduct, is incorrect as the case-law [1] cited by the General Court cannot be applied to the present case.

Contrary to the interpretation of the General Court, it follows from the relevant provisions [2] that standing invitations to tender for the resale of cereals held by the intervention agencies of the Member States are to be managed by the Commission. In doing so, the Commission has both the competence to take decisions and a duty to conduct checks. [3] There was no discretion on the part of those intervention agencies.

The Commission's duty to conduct checks serves not only to protect the financial interests of the European Union, but also to protect the interests of individual market participants. Regulation No 884/2006 [4] sets out in specific terms the duty to conduct checks, to the effect that all intervention stores are to be checked at least once a year by the paying agencies in respect of proper conservation and the integrity of intervention stocks and a copy of the inspection reports must then be sent to the Commission. Those provisions were grossly disregarded in the present case.

The Commission's failure to exercise its powers of inspection prior to the invitation to tender at issue in the present case thus constitutes an aggravated and serious breach of duty.

In addition, the General Court made procedural errors in that it classified the statement of facts provided by the present appellant as incorrect without any taking of evidence and without a hearing.

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[1] Judgment of the Court of 1 January 2001 in Case C-247/98 *Commission* v *Greece* and judgment of the General Court of 13 November 2008 in Case T-224/04 *Italy* v *Commission*.

[2] In particular Articles 6 and 24 of Council Regulation (EC) No 1784/2003 of 29 September 2003 on the common organisation of the market in cereals (OJ 2003 L 270, p. 78).

[3] Article 37 of Council Regulation (EC) No 1290/2005 of 21 June 2005 on the financing of the common agricultural policy (OJ 2005 L 209, p. 1).

[4] Commission Regulation (EC) No 884/2006 of 21 June 2006 laying down detailed rules for the application of Council Regulation (EC) No 1290/2005 as regards the financing by the European Agricultural Guarantee Fund (EAGF) of intervention measures in the form of public storage operations and the accounting of public storage operations by the paying agencies of the Member States (OJ 2006 L 171, p. 35).

Reference for a preliminary ruling from the Verwaltungsgerichtshof (Administrative Court) (Austria) lodged on 30 September 2011 — ÖBB-Personenverkehr AG v Schienen-Control Kommission and Bundesministerin für Verkehr, Innovation und Technologie

(Case C-509/11)

(2012/C 13/08)

Language of the case: German

Referring court

Verwaltungsgerichtshof (Administrative Court)

Parties to the main proceedings

Applicant: ÖBB-Personenverkehr AG

Defendants: 1. Schienen-Control Kommission

2. Bundesministerin für Verkehr, Innovation und Technologie

Questions referred

1. Is the first subparagraph of Article 30(1) of Regulation (EC) No 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations, OJ 2007 L 315, p. 14, to be interpreted as meaning that the national body designated responsible for the enforcement of that regulation may prescribe,