



Reports of Cases

Case C-218/11

Észak-dunántúli Környezetvédelmi és Vízügyi Igazgatóság (Édukövízig) and Hochtief Construction AG Magyarországi Fióktelepe, now Hochtief Solutions AG Magyarországi Fióktelepe

v

Közbeszerzések Tanácsa Közbeszerzési Döntőbizottság

(Reference for a preliminary ruling from the Fővárosi Ítéltábla)

(Directive 2004/18/EC — Public works contracts, public supply contracts and public service contracts — Articles 44(2) and 47(1)(b), (2) and (5) — Economic and financial standing of tenderers — Minimum capacity established on the basis of a single accounting indicator — Accounting indicator liable to be influenced by divergences between national laws as regards annual company accounts)

Summary – Judgment of the Court (Seventh Chamber), 18 October 2012

1. *Questions referred for a preliminary ruling — Jurisdiction of the Court — Limits — Jurisdiction of the national court — Need for a preliminary ruling and relevance of questions referred — Assessment by the national court*

(Art. 267 TFEU)

2. *Approximation of laws — Procedures for the award of public works contracts, public supply contracts and public service contracts — Directive 2004/18 — Conduct of the procedure — Award of contracts — Qualitative selection criteria — Economic and financial standing — Minimum level established by reference to one or more particular features of the balance sheet — Lawfulness — Conditions — Obligation to disregard such a criterion because of the divergence of the laws of the Member States concerned as regards the features of the balance sheet at issue — None*

(European Parliament and Council Directive 2004/18, Arts 44(2) and 47(1)(b))

3. *Approximation of laws — Procedures for the award of public works contracts, public supply contracts and public service contracts — Directive 2004/18 — Conduct of the procedure — Qualitative selection criteria — Economic and financial standing — Economic operator unable to satisfy the requirement imposed because of an agreement under which that economic operator systematically transfers its profits to its parent company — Economic operator may rely on the capacities of other entities — Legislation of the Member State of the economic operator authorises the transfer of profits without limitation, unlike the legislation of the Member State of the contracting authority — No effect*

(European Parliament and Council Directive 2004/18, Art. 47)

1. See the text of the decision.

(see para. 23)

2. Articles 44(2) and 47(1)(b) of Directive 2004/18 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts must be interpreted as meaning that a contracting authority may require a minimum level of economic and financial standing by reference to one or more particular aspects of the balance sheet, provided that those aspects are such as to provide information on such standing of an economic operator and that that level is adapted to the size of the contract concerned in that it constitutes objectively a positive indication of the existence of a sufficient economic and financial basis for the performance of that contract, without, however, going beyond what is reasonably necessary for that purpose. The requirement of a minimum level of economic and financial standing cannot, in principle, be disregarded solely because that level relates to an aspect of the balance sheet regarding which there may be differences between the legislations of the different Member States.

(see para. 32, operative part 1)

3. Article 47 of Directive 2004/18 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts must be interpreted as meaning that, where an economic operator cannot meet a minimum level of economic and financial standing consisting in a requirement that the profit/loss item in the balance sheet of candidates or tenderers should not be negative for more than one of the last three completed financial years because of an agreement under which that economic operator systematically transfers its profits to its parent company, that operator has no other option, in order to meet that minimum capacity level, than to rely on the capacities of another entity, in accordance with Article 47(2). It is irrelevant in that regard that the legislation of the Member State of establishment of that economic operator and that of the Member State of establishment of the contracting authority differ in that such an agreement is authorised without limitation by the legislation of the first Member State whereas, under the legislation of the second, it would only be authorised on condition that the transfer of profits does not have the effect of making the profit/loss item in the balance sheet negative.

(see para. 39, operative part 2)