Reports of Cases

OPINION OF ADVOCATE GENERAL
WAHL
delivered on 30 April 2014[1]

Case C-113/13

Azienda Sanitaria Locale No 5 'Spezzino'
Associazione Nazionale Pubblica Assistenza (ANPAS) — Comitato Regionale Liguria
Regione Liguria
v
San Lorenzo Società Cooperativa Sociale
Croce Verde Cogema Cooperativa Sociale Onlus

(Request for a preliminary ruling from the Consiglio di Stato (Italy))

(Articles 49 TFEU and 56 TFEU — Directive 2004/18/EC — Public service contracts — Medical transport services — Award of contracts without call for tenders — Voluntary organisations — Reimbursement of costs)

1. Voluntary (or charitable) organisations are universally recognised for, inter alia, the important social, medical and humanitarian functions they provide to the benefit of society as a whole, and in particular to the benefit of its weakest members (for example, victims of wars or natural disasters and sick, poor or elderly people).

2. These organisations are often granted special legal status, not only under national laws, but also under public international law.[2] Evidently, the European Union also does not overlook the specific characteristics of voluntary organisations, and attaches great importance to the contribution they make to the construction of a fair and just society.[3] This is why in some of its decisions, such as *Stauffer*[4] and *Sodemare*,[5] the Court did not hesitate to recognise their unique characteristics within the EU legal order.

1 — Original language: English.

2 — For example, charitable organisations have been given a specific legal status in times of war, since the first Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, signed in Geneva on 22 August 1864. Moreover, with Resolution 45/6 of 16 October 1990, the United Nations General Assembly granted observer status to the International Committee of the Red Cross, in consideration of the special role and mandates conferred upon it by the Geneva Conventions.

3 — For example, see the dialogue between EU institutions and civil society required by Article 11 TEU and Article 15 TFEU. In addition, under Article 300(2) TFEU, the Economic and Social Committee is to consist, among others, of representatives of civil society. Furthermore, a number of declarations attached to the Treaties emphasise the important contribution made by voluntary organisations to the development of social solidarity within the European Union: notably, Declaration 23 attached to the 1992 Treaty on European Union, and Declaration 38 attached to the Treaty of Amsterdam.

4 — Case C-386/04 *Centro di Musicologia Walter Stauffer* [2006] ECR I-8203. On the implications of this ruling for voluntary organisations in the context of the EU legal order, see extensively Breen, O.B., 'EU Regulation of Charitable Organisations: The Politics of Legally Enabling Civil Society', 3 (2008) *The International Journal of Not-for-Profit Law*, pp. 50 to 78.

5 — Case C-70/95 *Sodemare and Others* [1997] ECR I-3395 ('*Sodemare*'). I will deal in more detail with this case *infra*, in points 62, and 71 and 72.

3. However, there may be circumstances in which the special rights or benefits granted to such organisations under national laws may lead to some tensions between those rights or benefits and the uniform application of the EU rules. The present proceedings concern precisely one such case. The Consiglio di Stato (Council of State) seeks guidance as to whether a national provision that requires public authorities, under certain conditions, to award the operation of medical transport services directly to voluntary organisations is compatible with the EU internal market provisions.

I – **Legal framework**

A – *EU law*

4. According to Article 1(2)(a) 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: [6]

'"Public contracts" are contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services within the meaning of this Directive.'

5. Article 1(8) of the directive provides as follows:

'The terms "contractor", "supplier" and "service provider" mean any natural or legal person or public entity or group of such persons and/or bodies which offers on the market, respectively, the execution of works and/or a work, products or services.

The term "economic operator" shall cover equally the concepts of contractor, supplier and service provider. It is used merely in the interest of simplification.

…'

6. Article 7 of Directive 2004/18 specifies, in terms of the value of a public contract, the thresholds at or above which the directive is to apply.

7. Articles 20 and 21 of Directive 2004/18 determine the award procedures for, on the one hand, contracts which have as their object services listed in Annex II A (to be awarded in accordance with Articles 23 to 55), and, on the other, contracts which have as their object services listed in Annex II B (subject solely to Articles 23 and 35(4)).

8. In particular, Annex II A lists, under category No 2, 'land transport services', and Annex II B lists, under category No 25, 'health and social services'.

B – *Italian law*

9. Article 75b of Regional Law No 41 of 7 December 2006 of Regione Liguria, as amended, ('Article 75b RL') states:

'1. The provision of medical transport services is an activity in the general interest governed by the principles of universality, solidarity, affordability and appropriateness.

6 — OJ 2004 L 134, p. 114.

2. Medical transport services, as referred to in paragraph 1, shall be provided by individual health agencies … using their own resources and personnel. Where this is not possible, medical transport services shall be entrusted to other persons or entities …, in accordance with the following principles:

(a) medical transport services to be provided on behalf of the Regional Health Service shall be entrusted, in priority, to voluntary organisations, the Red Cross and other authorised public institutions or bodies, so as to ensure that that service of general interest is provided in conditions of economic equilibrium as regards the budget. The relationship with the Italian Red Cross and the voluntary organisations shall be governed by agreements …;

(b) where medical transport services are entrusted to persons or entities other than those referred to in point (a), that shall take place in accordance with the applicable laws concerning the award of public service and supply contracts.

3. The agreements … referred to in paragraph 2(a) shall provide, in respect of voluntary associations [and] the Italian Red Cross …, only for the reimbursement of expenses actually incurred, according to the criteria established by the Regional Council on the basis of the principles of economy and efficiency and the principle that there should be no over-compensation for the costs incurred.'

II – **Facts, procedure and the questions referred**

10. By decision No 940 of 22 December 2010, and in accordance with the applicable regional laws, the local health authority ASL No 5 'Spezzino' ('ASL No 5'), concluded agreements for the provision of medical transport services with two voluntary organisations: Associazione Nazionale Pubblica Assistenza ('ANPAS') and Croce Rossa Italiana (the Italian Red Cross).

11. San Lorenzo Società Cooperativa Sociale and Croce Verde Cogema Cooperativa Sociale Onlus ('the respondents in the main proceedings'), two cooperatives which operate medical transport services in the Liguria region, brought an action before the Tribunale Amministrativo Regionale della Liguria (Regional Administrative Court of Liguria; 'the TAR Liguria'), contesting the award of the contracts by ASL No 5.

12. The TAR Liguria concluded that the agreements challenged by the respondents in the main proceedings constituted public contracts awarded in breach of the principles laid down in Articles 49, 56 and 105 TFEU. An appeal against the judgment of the TAR Liguria was brought before the Consiglio di Stato by ASL No 5, the Regione Liguria and ANPAS.

13. The Consiglio di Stato, entertaining doubts as to the compatibility of Article 75b RL with EU law, decided to stay the proceedings and to refer the following questions for a preliminary ruling:

'(1) Do Articles 49 TFEU, 56 TFEU, 105 TFEU and 106 TFEU preclude a provision of national law under which medical transport services are awarded, in priority, to voluntary associations, the Italian Red Cross and other authorised public institutions or bodies, albeit pursuant to agreements which provide only for reimbursement of expenditure that is actually incurred?

(2) Does EU law on public tendering — in the case under examination concerning excluded contracts and the general principles of free competition, non-discrimination, transparency and proportionality — preclude national legislation which permits the direct awarding of medical transport services on the ground that a framework contract such as that contested in this case, which provides for the reimbursement also of fixed and ongoing costs, must be classified as for pecuniary interest?'

14. Written observations in the present proceedings have been submitted by ANPAS, Regione Liguria, and by the Commission. ANPAS, San Lorenzo Società Cooperativa Sociale, the Italian Government as well as the Commission presented oral argument at the hearing on 26 February 2014.

III – **Analysis**

A – *Introduction*

15. By its questions, the referring court in substance seeks guidance as to whether a national rule on the direct award of medical transport services, such as Article 75b RL, is compatible with EU law.

16. According to Article 75b RL, medical transport services are in principle to be provided directly by the local health authorities using their own resources. However, where those authorities are unable to provide the services themselves, they may have recourse to external providers. In such a case, they should in principle entrust those services to voluntary organisations (such as the Red Cross) or to other public bodies, against a mere reimbursement of costs. Where that is not feasible, the local health authorities may outsource those services to other persons or entities, selected in compliance with public procurement rules.

17. Despite the fact that, in its questions, the national court refers to several provisions of the FEU Treaty (such as those on the freedom of establishment, the free movement of services and free competition) and of secondary legislation (such as the rules on public procurement), as well as to some general principles of law (such as the principles of non-discrimination, transparency and proportionality), it is clear to me that the relevant EU rules in the present proceedings are, on the one hand, Articles 49 and 56 TFEU, and, on the other, the provisions of Directive 2004/18.

18. Indeed, those are the only EU rules in relation to which the referring court explains the reasons for its doubts. Conversely, no real explanation is provided by that court on the connection which it sees between the other EU provisions or principles referred to in its questions and the dispute in the main proceedings.[7] Moreover, in the light of well-established case-law — which I will set out in more detail below — Articles 49 and 56 TFEU and Directive 2004/18 are, in my view, the EU provisions which may potentially conflict with — and, thus, preclude — a national provision such as Article 75b RL.

19. In view of the foregoing, I consider that the two questions referred can be examined together insofar as they essentially concern the same issue. Accordingly, I suggest that the Court reformulate those questions as follows: 'Do Articles 49 and 56 TFEU and Directive 2004/18 preclude a provision of national law under which, when contracts for the supply of medical transport services are awarded, priority is given to voluntary organisations, such contracts being awarded to them without any form of call for competition and providing only for reimbursement of the costs actually incurred?'

7 — Thus, to the extent that the referring court does not provide the Court with all the factual and legal information necessary for it to be able to determine the circumstances in which the national provision at issue in the main proceedings might contravene the other EU rules mentioned in point 17, the questions referred could be considered to be partially inadmissible. See, to that effect, Joined Cases C-419/12 and C-420/12 *Crono Service and Others* [2014] ECR, paragraphs 31 to 33.

B – *Consideration of the questions referred*

1. Preliminary remarks

20. At the outset, I would like to address two preliminary objections, put forward by Regione Liguria and ANPAS, as to whether a national provision such as Article 75b RL falls within the scope of the EU rules on public procurement.

21. First, Regione Liguria and ANPAS emphasise that the voluntary organisations envisaged by Article 75b RL are only those which are constituted as non-profit-making entities under the relevant Italian legislation [8] and those that, as such, do not engage in any economic activity. Second, they stress that Article 75b RL does not provide for any form of remuneration, but only for reimbursement of the costs actually incurred.

22. In essence, Regione Liguria and ANPAS contest, on the one hand, the assertion that voluntary organisations can be qualified as 'undertakings' under EU law, and in particular as 'economic operators' for the purposes of Article 1(8) of Directive 2004/18, and, on the other hand, that the services of such organisations are provided 'for pecuniary interest' within the meaning of Article 1(2)(a) of Directive 2004/18.

23. I cannot agree with those arguments.

24. On the first point, I would call to mind that, according to settled case-law, the fact that a given entity is non-profit-making, [9] and that its personnel provide their services as unremunerated volunteers, [10] is irrelevant under EU public procurement rules. The concept of 'economic operator' is very broad and must be understood to encompass *any* entity which offers goods or services on the market. [11] Thus, the nature of 'economic operator' in respect of a given entity does not depend on what that entity is (for example, its internal composition, structure or functioning), but rather on what that entity does (that is, the type of activities that it carries out). In that regard, the Court has consistently held that the provision of emergency transport services and patient transport services constitutes an economic activity under EU law. [12]

25. This is also confirmed by the case-law of the Consiglio di Stato which states that voluntary organisations constituted in accordance with the Italian Framework Law on Voluntary Organisations are entitled to offer services on the market, although only in limited circumstances. On that basis, the Consiglio di Stato found that those organisations are permitted, under certain conditions, to participate in calls for tenders, in competition with other (public and private) economic operators. [13]

8 — They refer, in particular, to Law No 266 of 11 August 1991, *Legge quadro sul volontariato* (Framework law on voluntary organisations) (*GURI* No 196 of 22 August 1991).

9 — See judgment of 29 November 2007 in Case C-119/06 *Commission* v *Italy*, paragraphs 37 to 41; Case C-305/08 *CoNISMa* [2009] ECR I-12129, paragraphs 30 and 45; and Case C-159/11 *Ordine degli Ingegneri della Provincia di Lecce and Others* [2012] ECR, paragraph 26.

10 — See, to that effect, *Commission* v *Italy*, paragraph 40 and case-law cited.

11 — See, inter alia, Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, paragraphs 21 to 23, and Opinion of Advocate General Mazak in *CoNISMa*, points 22 and 23.

12 — See Case C-475/99 *Ambulanz Glöckner* [2001] ECR I-8089, paragraphs 21 and 22, and *Commission* v *Italy*, paragraph 38.

13 — See, in particular, judgments of the Consiglio di Stato of 23 January 2013, No 387, and of 15 April 2013, No 2056.

26. On the second point, which concerns the notion of pecuniary interest, it is sufficient to observe that, in *Ordine degli Ingegneri della Provincia di Lecce and Others*, the Court has already made clear that a contract cannot fall outside the concept of public contract under Directive 2004/18 merely because the remuneration remains limited to reimbursement of the expenditure incurred in providing the service.[14] A mere cost-covering remuneration therefore fulfils the criterion of 'pecuniary interest' for the purposes of that legal instrument.

27. It is immaterial, in that context, whether the costs to be reimbursed by the public authorities cover only what the parties refer to as 'direct costs' (and which I understand to mean marginal costs), or extend also to 'indirect costs' (that is to say, a part of fixed costs, calculated in proportion to the share that the medical transport services entrusted have on the overall activity of the organisation). In fact, even if a national provision were to provide for the mere reimbursement of direct costs, that would not be enough to take the contracts concluded under that provision outside the scope of the EU rules on public procurement.

28. In the light of the foregoing, neither the non-profit-making nature of the voluntary organisations referred to in Article 75b RL, nor the fact that their services are provided in return for reimbursement of costs, is capable of excluding the application of the EU rules on public procurement.

2. Directive 2004/18

29. By virtue of Article 7 thereof, Directive 2004/18 applies only to public contracts which have a value estimated to be equal to, or greater than, the thresholds indicated in the directive. As concerns the type of service contracts provided for in Article 75b RL, Article 7(b) of that directive, as applicable at the material time, provided for a threshold of EUR 193 000.

30. The Court has already held that medical transport services are services of a mixed nature, since they have both a health service component and a transport component. As such, they come within both Annex II A and Annex II B to Directive 2004/18.[15] This means that, when the value of the transport component exceeds the value attached to the health-related services (as may be the case for scheduled long-distance transport of patients), then all the provisions of the directive apply. When, on the contrary, the health-related component prevails (as may be the case for emergency ambulance services) then — by virtue of Article 21 of the directive — only some of its provisions apply.[16]

31. This evaluation is to be carried out on a case-by-case basis by the national administration which decides to put the services in question out to tender, subject to review, in the event of legal challenge, by the competent domestic courts.

32. In any event, leaving aside the issue relating to the complete or partial applicability of the provisions of Directive 2004/18 to single awards, what should be stressed here is that the Court has already held that medical transport services are not, as such, outside the scope of that legal instrument.

33. It is true that, as Regione Liguria and ANPAS point out, pursuant to Article 168(7) TFEU, as clarified by the case-law of the Court,[17] EU law does not detract from the power of the Member States to organise their social security systems and to adopt, in particular, provisions intended to govern the organisation and supply of health services and medical care.

14 — *Ordine degli Ingegneri della Provincia di Lecce and Others*, paragraph 29. See also Opinion of Advocate General Trstenjak in the same case, points 31 to 34.

15 — See Article 22 of Directive 2004/18. See also Case C-76/97 *Tögel* [1998] ECR I-5357, paragraph 40, and Case C-160/08 *Commission* v *Germany* [2010] ECR I-3713, paragraph 92.

16 — Namely, Articles 23 and 35(4) of Directive 2004/18.

17 — See, among many, Case C-84/11 *Susisalo and Others* [2012] ECR 2012, paragraph 26 and case-law cited.

34. In fact, there are clear limits to EU action in that field. In the first place, the Treaties lay down a prohibition on harmonisation in that area.[18] In addition, the Court has granted Member States ample discretion when introducing and maintaining domestic measures which, despite potentially creating obstacles to free movement within the internal market, are aimed at protecting public health.[19]

35. That said, the Court's case-law also makes clear that Member States, when exercising their powers in the field of health and medical care, must none the less comply with EU law, and in particular with the provisions on the internal market. Those provisions, amongst other things, prohibit the Member States from introducing or maintaining unjustified restrictions on the exercise of those freedoms in the health and medical care sector.[20]

36. Therefore, the health and medical care sector cannot be considered to constitute a safe haven against the application of EU rules. *A fortiori*, that is true with regard to a set of provisions which, like Directive 2004/18, is, by clear choice of the EU legislature, meant to apply to those sectors. Indeed, Annex II B to that directive explicitly lists (under category No 25) 'health and social services' among those which it covers.

37. Conversely, the economic sectors or types of contracts which are excluded from the scope of Directive 2004/18,[21] and the specific types of entities to which special arrangements apply,[22] are expressly indicated in the derogating provisions of the directive itself.

38. Nor, on the basis of the documents before the Court, can it be said that the 'in-house' or the 'public-public-partnership' exceptions are applicable in the present case:[23] the local authorities in question do not necessarily exercise any control over the voluntary organisations mentioned in Article 75b RL which remain, in principle, private entities.

39. That does not mean, however, that the characteristics specific to the health and medical care sector have not been taken into account by the EU legislature. In fact, as has already been mentioned, the inclusion of that sector in Annex II B to Directive 2004/18 means that only a limited number of provisions of the directive apply,[24] thereby affording the Member States a wider discretion when, among other things, they select third-party service providers.

40. Incidentally, I observe that the new directive of the European Parliament and of the Council on public procurement, recently adopted, on 26 February 2014,[25] not only widens even further the Member States' discretion in that field (for example, by raising the threshold for healthcare services to EUR 750 000),[26] but also contains some specific rules for services provided by non-profit-making organisations.[27] This further confirms that, as the law currently stands, the service contracts envisaged by Article 75b RL are caught by Directive 2004/18.

18 — See, in particular, Article 2(5) TFEU.

19 — See, inter alia, Cases C-141/07 *Commission* v *Germany* [2008] ECR I-6935, paragraph 51; Joined Cases C-171/07 and C-172/07 *Apothekerkammer des Saarlandes and Others* [2009] ECR I-4171, paragraph 19; and Joined Cases C-159/12 to C-161/12 *Venturini and Others* [2013] ECR, paragraph 41.

20 — See, to that effect, Case C-141/07 *Commission* v *Germany*, paragraphs 22 and 23, and Case C-169/07 *Hartlauer* [2009] ECR I-1721, paragraph 29.

21 — See, in particular, Articles 12 to 18 of Directive 2004/18.

22 — See Article 19 of Directive 2004/18.

23 — Cf. *Ordine degli Ingegneri della Provincia di Lecce and Others*, paragraphs 31 to 35.

24 — In addition to the rules and principles of primary EU law which will be discussed in the next section of this Opinion. See, to that effect, Case C-507/03 *Commission* v *Ireland* [2007] ECR I-9777, paragraphs 26 to 29.

25 — 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 (OJ 2014 L 94, p. 65).

26 — Articles 4(d), and 74 to 77 of Directive 2014/24, as well as recitals 114, 118 in the preamble and Annex XIV thereto.

27 — See Article 10(h) of Directive 2014/24 and recital 28 in the preamble thereto.

41. Finally, it is scarcely necessary to add that, given the value of the services which are awarded on the basis of Article 75b RL, and the scope and duration of the contracts concluded by the public administration in that respect,[28] it may readily be assumed that the current threshold is likely to be met in a number of cases.

42. That being so, I take the view that Directive 2004/18 precludes a national provision such as Article 75b RL which, in certain circumstances, excludes any call for tenders or call for competition for the award of medical transport services, irrespective of the value of those services.

3. Articles 49 and 56 TFEU

43. The award of a public contract for medical transport services whose value does not reach the threshold indicated in Article 7(b) of Directive 2004/18 is not subject to the provisions of that directive.[29]

44. That does not mean, however, that any such contract is necessarily excluded from the scope of EU law. Indeed, when the contract in question has a cross-border interest, primary EU law is still applicable. In particular, contracting authorities are bound to comply with the fundamental freedoms enshrined in the FEU Treaty (and, notably, Articles 49 and 56 TFEU),[30] as well as with the principle of non-discrimination on the ground of nationality.[31]

45. It is, in principle, for the contracting authorities concerned[32] to assess whether a contract whose estimated value is below the relevant threshold may have a cross-border interest in the light, *inter alia*, of the value of the contract and the place where the services are to be rendered,[33] provided that such an assessment may be subject to judicial review.[34]

46. In the present case, it seems evident to me that, at least in a not insignificant number of cases, some contracts awarded on the basis of Article 75b RL may indeed have a cross-border interest. That is so, *inter alia*, because of the objective value of the services which are to be provided[35] and because the Regione Liguria borders on France.[36]

47. The Court has already held that, when a public contract has a cross-border interest, its award, in the absence of any transparency, to an undertaking located in the Member State to which the contracting authority belongs, amounts to a difference in treatment to the detriment of undertakings which might be interested in that contract which are located in other Member States. Thus, unless it is justified by objective circumstances, such a difference in treatment, by excluding all undertakings located in another Member State, amounts to indirect discrimination on the basis of nationality, prohibited under Articles 49 and 56 TFEU.[37]

28 — As evidenced by the documents contained in the case-file. See, in particular, the amounts of the costs (projected and actually incurred) of the medical transport services awarded which are set out in Decision No 441 of the Government of the Regione Liguria ('*Deliberazione della Giunta Regionale*') of 26 April 2007, as well as in Decision No 94 of ASL No 5 ('*Deliberazione del Direttore Generale*') of 22 December 2010.

29 — See, to that effect, *Commission* v *Italy*, paragraphs 59 and 60.

30 — Case C-231/03 *Coname* [2005] ECR I-7287, paragraph 16.

31 — Case C-225/98 *Commission* v *France* [2000] ECR I-7445, paragraph 50.

32 — Such as the local health authorities which decide to outsource the provision of medical transport services pursuant to Article 75b RL.

33 — Joined Cases C-147/06 and C-148/06 *SECAP and Santorso* [2008] ECR I-3565, paragraph 31, and *Ordine degli Ingegneri della Provincia di Lecce and Others*, paragraph 23.

34 — *SECAP and Santorso*, paragraph 30.

35 — See point 41 above.

36 — For example, as ANPAS indicated during the hearing, some entities providing medical transport services in Liguria have entered into agreements with other entities providing the same services in the neighbouring areas in France in order to govern the relationship between them.

37 — See, to that effect, *Commission* v *Ireland*, paragraphs 30 and 31, and Case C-347/06 *ASM Brescia* [2008] ECR I-5641, paragraphs 59 and 60.

48. At the hearing, ANPAS and the Italian Government pointed out that, to the extent that contracts for the services in question are awarded on the basis of decisions of the public authorities (for example, of the Regional Government), some publicity does exist as those decisions are regularly published through official channels (including websites).

49. However, that form of publicity, to my mind, does not suffice in order to meet the requirements of EU law. In this context, transparency is not an end in itself[38] but, as the Court has made clear, aims to ensure that economic operators located in the territory of a Member State other than that of the contracting authority can have access to appropriate information regarding the contract concerned before it is awarded, so that, if any operator so wishes, it is in a position to express its interest in obtaining that contract.[39] In other words, the degree of advertising must be sufficient to enable the public contract to be opened up to some degree of competition, and for the impartiality of procurement procedures to be reviewed:[40] even though a call for tenders may not be necessary, the contracting authority should, nonetheless, ensure that there is some form of call for competition which is adequate to the circumstances.[41]

50. Yet, Article 75b RL leaves no room for manoeuvre for the contracting authorities to establish whether, in the light of the specific circumstances of each case, the contract to be awarded falls within the scope of EU law and, if so, to proceed with the award in compliance with the applicable principles of EU law. Indeed, Article 75b RL requires contracting authorities always to give priority to voluntary organisations, as far as they are available, irrespective of whether or not the contract may have a cross-border interest. Thus, it is inevitable that no form of call for competition will take place, to the detriment of entities established outside of Italy which might be interested in those contracts. This entails possible discrimination prohibited under Articles 49 and 56 TFEU.

51. The wording of Article 75b RL does not explicitly limit that priority rule to voluntary organisations constituted under Italian law. Nevertheless, such a measure is at least capable of excluding from the tendering procedure entities which are based in other Member States and have not been established as non-profit-making entities.

52. A provision such as Article 75b RL is thus likely to create an obstacle to the freedom of establishment and to the freedom to provide services, under Articles 49 and 56 TFEU, in a number of cases.

53. However, it is well-established case-law that domestic legislation which is such as to restrict fundamental freedoms guaranteed by the Treaty may be justified if that legislation is appropriate for securing the attainment of the objective pursued and does not go beyond what is necessary for that purpose.[42]

54. To my mind, it is clear that measures which are genuinely designed to ensure that medical services (such as, for example, medical transport services) provided on behalf of the public authorities to all citizens are reliable and of good quality, while at the same time minimising the cost to the public purse, are in principle capable of justifying a restriction of those fundamental freedoms.[43]

55. Nonetheless, in the present case, I do not see how a national provision such as Article 75b RL would be capable of contributing significantly towards the attainment of those objectives.

38 — See, *mutatis mutandis*, Case C-336/12 *Manova* [2013] ECR, paragraphs 28 and 29.

39 — See, to that effect, *Coname*, paragraph 21.

40 — Case C-458/03 *Parking Brixen* [2005] ECR I-8585, paragraph 49. See also Case T-258/06 *Germany* v *Commission* [2010] ECR II-2027, paragraphs 76 to 80.

41 — *Parking Brixen*, paragraph 50.

42 — Among many, see Case C-376/08 *Serrantoni and Consorzio stabile edili* [2009] ECR I-12169, paragraph 44.

43 — See, by analogy, Case C-158/96 *Kohll* [1998] ECR I-1931, paragraph 41, and *Venturini and Others*, paragraphs 41 to 42.

56. First, it is not argued that businesses located in other Member States would not be capable of ensuring adequate provision of medical transport services. Second, despite what Regione Liguria and ANPAS contend, the absence of any form of public procurement procedure or of previous publicity would seem usually to work to the detriment of public finances.

57. Opening up award procedures to other potential tenderers may provide contracting authorities with more offers (and thus with more choice in terms of both quality and price), and should encourage operators which are interested in the award to be more economical and efficient.

58. A non-profit-making entity that, potentially, has to compete with other entities for an award would presumably not make an offer which is higher than the one it would have made in a situation in which the award was reserved to it by law. If anything, the existence of competitors would normally encourage that entity to be even more cost-conscious, by using its resources more effectively.

59. The fact that the respondents in the main proceedings are non-profit-making organisations which would have been interested in providing the services concerned shows that there is clearly scope for opening the award of such services to a higher degree of competition, even among non-profit-making entities. [44]

60. In any event, the question as to whether, in a specific case, a restriction under Articles 49 and 56 TFEU may be justified and, furthermore, proportionate, is a matter that falls to be determined, in principle, by the competent domestic courts. In the event of doubt, those courts may refer questions to the Court under the preliminary ruling procedure.

61. Yet, for the reasons given in the preceding points, it is inconceivable, in my view, that such a restriction can be deemed to be justified and proportionate where it is based on an *a priori* and general derogation from Articles 49 and 56 TFEU, such as the procedure introduced by Article 75b RL.

C – *Final remarks*

62. Finally, a last point raised by Regione Liguria and ANPAS is worth discussing briefly. According to those parties, Article 75b RL is an expression of the principle of solidarity, which is a fundamental value enshrined in Articles 2 and 18 of the Italian Constitution. A provision such as Article 75b RL is, in their view, not only aimed at limiting public expenditure for the medical services concerned, but also at encouraging citizens to engage in charitable activities and to provide voluntary work for the benefit of society as a whole. It was in fact in application of the principle of solidarity — so they argue — that the Court ruled, in *Sodemare*, that EU law does not preclude a Member State from allowing only non-profit-making private operators to participate in the running of its social welfare system, by concluding contracts which entitle them to be reimbursed by the public authorities for the cost of providing social welfare services of a health and medical care nature.

63. I am mindful of the fact that the pursuit of economic efficiency in a Europe-wide market based on free and open competition is not an end in itself, but only an instrument to achieve the aims for which the European Union has been created. [45] Accordingly, I am prepared to accept that the need to promote and protect one of the fundamental values on which the European Union is founded may, at times, prevail over the imperatives of the internal market.

44 — As the Court has already stated, the fact that the award of a contract may not be capable of generating substantial net revenue does not mean that that contract is of no economic interest for undertakings located in Member States other than that of the contracting authority. Indeed, in the context of an economic strategy to extend part of its activities to another Member State, an undertaking may decide to seek the award in that State of the contract despite the fact that that contract is incapable as such of generating sufficient profit. See Case C-388/12 *Comune di Ancona* [2013] ECR, paragraph 51.

45 — See, in particular, Article 3(1) to (3) TEU.

64. As Advocate General Mengozzi pointed out in a recent Opinion,[46] solidarity is explicitly mentioned in Article 2 TEU among the values underpinning the European model of society as it derives from the EU Treaties. Therefore, the fact that entities such as the voluntary organisations envisaged by Article 75b RL have been entrusted, by the national legislature, with the important function of fostering, within their sphere, the value of solidarity in Italian society, is not — and cannot be — an element without relevance under EU law.

65. However, the important function attributed to those organisations cannot be pursued, I would say, by acting *outside* the scope of the common rules, but by operating *within* the boundaries of those rules, taking advantage of the specific rules enacted by the legislature with a view to supporting their activities.

66. For example, Article 26 of Directive 2004/18, states that contracting authorities 'may lay down special conditions relating to the performance of a contract, provided that these are compatible with [EU] law and are indicated in the contract notice or in the specifications. The conditions governing the performance of a contract may, in particular, concern *social* and environmental considerations'.[47]

67. In fact, the Court has accepted that considerations relating to social objectives may be taken into account by contracting authorities, when they do not directly or indirectly entail discrimination against tenderers from other Member States, and provided that they are expressly stated in the contract notice, so that operators may become aware of their existence.[48]

68. Legal literature as well generally considers that contracting authorities cannot be prevented from having recourse to the public procurement instruments to achieve public objectives (for example, in the social sector), provided that those objectives are pursued in addition to the (traditional) economic objectives, that the procedural requirements of the EU directives are complied with, and that the result is compatible with the aims of those directives.[49]

69. To my mind, the provisions of Directive 2004/18 concerning, inter alia, technical specifications (Article 23), conditions for performance of contracts (Article 26), criteria for qualitative selection (Articles 45 to 52) and criteria for the award of contracts (Articles 53 to 55) offer contracting authorities sufficient latitude to pursue social objectives alongside economic objectives, while respecting both the letter and the spirit of Directive 2004/18. Within that context, and provided that those rules are not deprived of their effectiveness, there may be some scope for the national legislature to take into account and, where appropriate, give preference to service providers which are constituted as voluntary associations or, more generally, as non-profit-making entities. This is *a fortiori* the case when contracting authorities are bound only by the provisions of Directive 2004/18 which are applicable to public contracts having as their object services listed in Annex II B, or by the general principles which derive from EU primary law, and in particular from Articles 49 and 56 TFEU.

70. That is so notwithstanding the fact that, in all likelihood, voluntary organisations which merely ask for reimbursement of the expenses incurred, and which are run in a reasonably effective manner, should, in principle, often be able to prevail in public award procedures simply by virtue of their cost-effectiveness.

46 — Opinion in Case C-574/12 *Centro Hospitalar de Setúbal and SUCH*, pending, point 40.

47 — Emphasis added. See also recital 46 in the preamble to Directive 2004/18.

48 — See Case 31/87 *Beentjes* [1988] ECR 4635, paragraphs 14 to 37, and *Commission* v *France*, paragraphs 46 to 54. Cf. also Case C-271/08 *Commission* v *Germany* [2010] ECR I-7091, paragraph 58.

49 — Cf., among others, Trepte, P., *Public procurement in the EU. A Practitioner's Guide*, Oxford: 2007 (2nd ed.), p. 63 et seq., and Arrowsmith, S., 'Application of the EC Treaty and directives to horizontal policies: a critical review', in Arrowsmith, S., and Kunzlik, P., (eds.), *Social and Environmental Policies in EC Public Procurement Law*, Cambridge: 2009, p. 162 et seq.

71. As concerns, finally, the *Sodemare* ruling, referred to by Regione Liguria and ANPAS, I would point out that that judgment did not deal with the application of public procurement rules. That case concerned the welfare system adopted by Regione Lombardia, in which only non-profit-making entities were permitted to provide certain services to the public when the cost of those services was either covered by the patients, in whole or in part, or by the Region.

72. As I understand it, there was no award of a service contract by Regione Lombardia to one or more specific entities among those which were potentially interested. Rather, the system was open and non-discriminatory to the extent that all entities which met certain objective requirements as laid down in the applicable laws could be admitted to the welfare system as providers of social welfare services. It was against that background that the Court, having also taken into account the solidarity and social elements on which the statutory welfare system was based, found that such a system did not give rise to any distortion of competition between undertakings located in different Member States and did not create an obstacle to the freedom of establishment prohibited by what is now Article 49 TFEU.

73. In conclusion, I take the view that a Member State is entitled to award medical transport services to voluntary organisations, in priority, without following the EU rules on public procurement only when the value of those services does not exceed the threshold provided for in Directive 2004/18, and the award does not entail any cross-border interest.

74. In particular circumstances, it is not inconceivable that a Member State may also be able to demonstrate that, despite the potential cross-border interest of a contract (with a value below that threshold), there are reasons in the general interest which may justify a derogation from the transparency requirements imposed by Articles 49 and 56 TFEU.

75. However, Articles 49 and 56 TFEU and Directive 2004/18 preclude a national provision — such as Article 75b RL — the effect of which is that voluntary organisations are entrusted, without any form of call for competition, with the provision of medical transport services, independently of the value of the awards and their potential cross-border impact.

IV – **Conclusion**

76. In the light of the foregoing, I propose that the Court answer the questions referred for a preliminary ruling by the Consiglio di Stato (Italy) as follows:

Articles 49 and 56 TFEU and 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 preclude a provision of national law under which, when contracts for the supply of medical transport services are awarded, priority is given to voluntary organisations, such contracts being awarded to them without any form of call for competition and providing only for reimbursement of the costs actually incurred.