Reports of Cases

OPINION OF ADVOCATE GENERAL
BOBEK
delivered on 24 November 2016[1]

Case C-387/14

Esaprojekt Sp. z o.o.
v
Województwo Łódzkie

(Request for a preliminary ruling from the Krajowa Izba Odwoławcza (National Appeals Chamber, Poland))

(Directive 2004/18/EC — Principles of non-discrimination and transparency — Submission by the tenderer of additional information concerning supplies not referred to in the initial offer — Possibility of combining the experience of two entities — Possibility to rely on experience obtained as member of a group of undertakings — Possibility to combine experience from multiple contracts — Serious misrepresentation)

I – **Introduction**

1. The present case concerns a public tender to supply hospital IT systems in Poland. The company Komputer Konsult Sp. z o.o. ('KK') was initially awarded that tender. Esaprojekt Sp. z o.o. ('Esaprojekt'), which had also submitted a bid, challenged that award before the national courts. The award was annulled because the experience relied on by KK was insufficient. KK was invited to clarify its list of experience. KK's amended list relied on new, third-party experience. KK was again awarded the contract. Esaprojekt again appealed, leading to the request for a preliminary ruling in this case.

2. The national court puts to the Court a series of questions that seek to determine, first, the conditions under which tenderers can modify their list of experience and rely on the experience of third parties. Second, the national court seeks clarification of the conditions under which information provided by a tenderer amounts to a 'misrepresentation' under Article 45(2)(g) of Directive 2004/18/EC.[2] Third, the national court asks whether experience obtained under separate contracts can be jointly relied on to meet a tender requirement, where such a possibility was not explicitly envisaged by the contracting authority.

1 — Original language: English.

2 — Directive 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 (OJ 2004 L 134, p. 114).

II – **Legal framework**

A – *EU law*

3. Article 2 of Directive 2004/18 ('the Directive') lays down the principle of transparency and non-discrimination in tenders for public works, public supply and public service contracts.

4. Article 44(1) states that contracts shall be awarded, among others, in accordance with the criteria of professional and technical knowledge or ability referred to in Article 48. Article 44(2) provides that any minimum capacity requirements imposed 'must be related and proportionate to the subject matter of the contract'.

5. Article 45(2)(g), which appears in the section entitled 'Criteria for qualitative selection', provides that an economic operator may be excluded from participation in a tender where it is 'guilty of serious misrepresentation in supplying the information required under this Section or has not supplied such information' and, in relation to Article 45(2) generally, that 'Member States shall specify, in accordance with their national law and having regard for Community law, the implementing conditions for this paragraph'.

6. Article 48(2) sets out ways in which experience may be evidenced, which includes at point (a) in particular, lists of works carried out, principal deliveries effected or main services provided.

7. Article 48(3) foresees that an economic operator 'may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them'. In such cases, the operator must prove that it has 'at its disposal the resources necessary for the execution of the contract, for example, by producing an undertaking by those entities to place the necessary resources at the disposal of the economic operator'.

8. Article 51, entitled, 'Additional documentation and information' states that a contracting authority 'may invite economic operators to supplement or clarify the certificates and documents submitted pursuant to Articles 45 to 50'.

B – *National law*

9. Article 2(13) of the Ustawa Prawo zamówień publicznych (Law on public contracts) ('the Ustawa PZP'), defines the notion of 'public contracts' as 'contracts for pecuniary interest concluded between a contracting authority and an economic operator whose subject is services, supplies or works'.

10. Article 24(2)(3) of the Ustawa PZP provides for the exclusion of economic operators which '… have submitted incorrect information which affects, or may affect, the result of the procedure carried out …'.

11. Article 26 of the Ustawa PZP foresees the possibility for the contracting authority to request tenderers to supply missing information, correct errors or clarify declarations or documents.

III – **Facts, procedure and questions referred**

12. The present case concerns a public tender for a contract for public hospital IT systems in the Province of Łódź (Poland). The relevant part of the tender relates to the purchase and supply of a hospital integrated system (HIS) to serve the (grey) administrative sector and the (white) medical sector at the Samodzielny Szpital Wojewódzki im. Mikołaja Kopernika (Nicolaus Copernicus Independent Provincial Hospital).

13. According to the tender specifications, applications for the award of the contract could be made by economic operators that were able to demonstrate, among others, that they had performed at least two contracts covering (in respect of each of the contracts referred to): the supply, installation, configuration and implementation of a HIS in the white and grey sectors, for a healthcare establishment with at least 200 beds, and having a value of not less than PLN 450 000 gross.

14. In order to demonstrate that they fulfilled the above condition, economic operators had to submit a declaration and a list of ‘principal supplies’ of HISs in the white and grey sectors.

15. In its tender KK listed two entries for supplies of a HIS in the white and grey sectors to hospitals in (i) Słupsk (the ‘Słupsk Supply’) and (ii) Nowy Sącz (the ‘Nowy Sącz Supply’). Both supplies were carried out by a consortium of Konsultant IT Sp. z o.o. (‘KIT’) and KK.

16. KK won the tender for the purchase and supply of the HIS. Esaprojekt challenged that decision, essentially claiming that the contracts listed by KK did not fulfil the tender requirements in terms of HIS experience.

17. The appeal was successful. The contracting authority was ordered to request that KK submit, in accordance with the procedure laid down in Article 26(4) of the Ustawa PZP, clarifications concerning the scope of the contracts specified in order to prove that the condition for participation in the procedure in terms of knowledge and experience was fulfilled.

18. Following the request for clarification, it transpired that the Słupsk Supply was made within the framework of two tender procedures and two separate contractual agreements. One of those agreements did not cover the white sector, and the other did not cover the grey sector. The contracting authority held that the Słupsk Supply did not respect the tender specifications mentioned above at point 13 of this Opinion, because the Słupsk Supply was not a single ‘public contract’, as defined in Article 2(13) of the Ustawa PZP. Instead, it involved two separate contracts. The contracting authority therefore asked KK to supplement the documents proving that it fulfilled the tender conditions.

19. In supplementing the documents, KK submitted a new list of supplies. That list included, as before, the Nowy Sącz Supply. In addition two new supplies were added, both of which were carried out by a third party, Medinet Systemy Informatyczne Sp. z o.o. (‘Medinet’) (‘the Medinet Supplies’). KK also submitted an undertaking by Medinet to make available the resources necessary to perform the contract and to participate in the performance of the contract as an adviser and consultant.

20. The contracting authority accepted the modified tender submitted by KK. Esaprojekt again lodged an appeal against the Województwo Łódzkie before the Krajowa Izba Odwoławcza (National Appeals Chamber, Poland). In those circumstances, that court decided to stay the proceedings and to refer the following questions for a preliminary ruling:

‘Question 1:

Does Article 51 of [Directive 2004/18], in conjunction with the principle of equal and non-discriminatory treatment of economic operators and the principle of transparency set out in Article 2 thereof, allow an economic operator, when clarifying or supplementing documents, to refer to the performance of contracts (that is to say, supplies provided) other than those which it referred to in the list of supplies attached to the tender, and in particular can it refer to the performance of contracts by another entity the use of whose resources it did not refer to in the tender?

Question 2:

In the light of the judgment of 10 October 2013, *Manova* (C-336/12, EU:C:2013:647), according to which “the principle of equal treatment must be interpreted as not precluding a contracting authority from asking a candidate, after the deadline for applying to take part in a tendering procedure, to provide documents describing that candidate’s situation —– such as a copy of its published balance sheet — which can be objectively shown to predate that deadline, so long as it was not expressly laid down in the contract documents that, unless such documents were provided, the application would be rejected”, must Article 51 of [Directive 2004/18] be interpreted as meaning that the supplementing of documents is possible only when it involves documents which can be objectively shown to predate the deadline for submitting tenders or requests to participate in the procedure, or that the Court of Justice stated only one of the possibilities and the supplementing of documents is possible also in other cases, for example by attaching documents which did not predate the deadline but which objectively confirm fulfilment of a condition?

Question 3:

If the answer to Question 2 is to the effect that the supplementing of documents other than as stated in the judgment in Case C-336/12 *Manova* is possible, is it possible to supplement by adding documents drawn up by the economic operator, subcontractors or other entities on whose capacities the economic operator relies, if they were not submitted together with the tender?

Question 4:

Does Article 44 of [Directive 2004/18], in conjunction with Article 48(2)(a) thereof and the principle of equal treatment of economic operators set out in Article 2, allow reliance on the resources of another entity, as referred to in Article 48(3), by combining the knowledge and experience of two entities, which, individually, do not have the knowledge and experience required by the contracting authority, where that experience cannot be divided (that is to say, the condition for participation in the procedure must be fulfilled in its entirety by the economic operator) and performance of the contract cannot be divided (constitutes a single whole)?

Question 5:

Does Article 44 of [Directive 2004/18], in conjunction with Article 48(2)(a) thereof and the principle of equal treatment of economic operators in Article 2, allow reliance on the experience of a group of economic operators in such a way that an economic operator which performed a contract as one of a group of economic operators can rely on the performance by that group, regardless of what its participation in the performance of that contract was, or can it rely only on the experience it itself has actually acquired in performing the relevant part of the contract which was assigned to it within that group?

Question 6:

Can Article 45(2)(g) of [Directive 2004/18], which states that any economic operator which is guilty of serious misrepresentation in supplying or not supplying information can be excluded from the procedure, be interpreted as excluding from the procedure an economic operator which submitted incorrect information which affected, or could affect, the result of the procedure, in that the guilt for misrepresentation lies in the very supply to the contracting authority of the factually inaccurate information which affects the decision of the contracting authority concerning exclusion of the economic operator (and rejection of its tender), regardless of whether the economic operator did so knowingly and wilfully, or unknowingly, through recklessness, negligence or failure to exercise due diligence? It is [sic] possible to regard as “guilty of serious misrepresentation in supplying the

information required … or [not having] supplied such information" only an economic operator which has submitted incorrect (factually inaccurate) information, or also one which has submitted information which is correct, but has done so in such a way as to satisfy the contracting authority that it fulfils the requirements laid down by the contracting authority it, even though it does not?

Question 7:

Does Article 44 of [Directive 2004/18], in conjunction with Article 48(2)(a) thereof and the principle of equal treatment of economic operators in Article 2, allow reliance by an economic operator on experience in such a way that it relies jointly on two or more contractual agreements as a single public contract, despite the fact that the contracting authority did not refer to such a possibility in the contract notice or the tender specifications?'

21. Written observations have been submitted by the Polish and Italian Governments and the Commission. The Polish Government, the Commission and the Województwo Łódzkie, defendant in the main proceedings, participated at the hearing held on 21 September 2016.

IV – **Assessment**

A – *Question 1 (and questions 2 and 3)*

22. The referring court's first question aims at determining whether, in the light of Articles 2 and 51 of the Directive, it is possible for a tenderer, after the tender's submission deadline, to make a reference to the experience of a third party, which was not referred to in the initial tender.

23. The second and third questions aim at determining whether, in the light of the judgment in *Manova*,[3] a tenderer can present documents that evidence its ability to rely on that third-party experience after the submission deadline (in the present case, the Medinet undertaking).

24. As regards the first question, I consider that the addition of such references is generally not possible for the reasons set out below. That answer renders any detailed consideration of the second and third questions redundant.

25. Article 51 of the Directive provides that contracting authorities may invite tenderers to 'supplement or clarify' the documents they have submitted. Those words, 'supplement or clarify', are arguably rather flexible. However, according to established case-law,[4] the principle of equal treatment and the obligation of transparency preclude any negotiation between the contracting authority and a tenderer during a public procurement procedure. Therefore, as a general rule, where the contracting authority regards a tender as imprecise or as failing to meet the technical requirements of the tender specifications, it cannot require the tenderer to provide clarification, or even create the impression that it would allow a tender to be amended.[5]

3 — Judgment of 10 October 2013, (C-336/12, EU:C:2013:647).

4 — See judgments of 29 March 2012, *SAG ELV Slovensko and Others* (C-599/10, EU:C:2012:191, paragraph 36); of 10 October 2013, *Manova* (C-336/12, EU:C:2013:647, paragraph 31); and of 7 April 2016, *Partner Apelski Dariusz* (C-324/14, EU:C:2016:214, paragraph 62).

5 — Judgment of 29 March 2012, *SAG ELV Slovensko and Others* (C-599/10, EU:C:2012:191, paragraph 41).

26. Notwithstanding, the Directive ‘does not preclude the correction or amplification of details of a tender, on a limited and specific basis, particularly when it is clear that they require mere clarification, or to correct obvious material errors’ as long as they do not amount to a new tender.[6] Due diligence can be expected from tenderers,[7] but excessive formalism is to be avoided.[8] That is particularly important given the need to ensure that tenders remain open and competitive.

27. The possibility for submitting additional information after the deadline for submission is therefore considered exceptional, but not non-existent. The question then becomes where precisely to draw the line.

28. In my view, the approach of the Court could perhaps best be captured by a metaphor: the information and documentation submitted by a tenderer upon the lapse of the submission deadline represents a snapshot. Only the information and documentation already contained in that picture may be taken into account by the contracting authority. This does not prevent the contracting authority from zooming in on any details in the picture that were a bit blurry and requesting an increase in the picture’s resolution in order to see the detail clearly. But the basic information must already have been, albeit in low resolution, in the original snapshot.

29. Following that logic, I consider that a tenderer, in principle, cannot be permitted to demonstrate that it fulfils the technical and professional requirements of a tender by relying on the experience of third parties not referred to prior to the submission deadline. That information was simply not contained in the original picture.

30. Therefore, such reliance on a third party does not amount to a mere clarification or formality. It constitutes in fact a significant change to the tender. The very identity of the entities carrying out the work, or at least whose experience is being called upon to do so, is being altered. That is a material change affecting a key element of the procedure.[9] Moreover, as pointed out by the Commission, such a change may lead to extra verifications being required by the contracting authority and could even affect the choice of candidates being invited to present an offer.

31. More generally, to allow such modifications can certainly have an influence on the competitive process. A tenderer’s decision to rely on its own experience or to call on that of a third party must be made at a certain moment in time and on the basis of information in its possession at that time. Giving a tenderer a second chance to take that business decision, when time has moved on, could certainly procure it an advantage that would be at odds with the requirement of equal treatment. For example, knowledge of the number or identity of competitors in the race or a downturn in the market may encourage the tenderer to seek to co-opt a partner with greater experience, to help increase its chances.[10]

32. Further support for this conclusion can be found by analogy with cases involving the modification of the composition of bidding consortia after the submission deadline. In the recent *Højgaard* case, a consortium of two companies was preselected and submitted a bid for a public tender, but was subsequently dissolved before the contract was awarded. One of the companies, Aarsleff, then sought

6 — See judgments of 7 April 2016, *Partner Apelski Dariusz* (C-324/14, EU:C:2016:214, paragraphs 63 and 64); of 29 March 2012, *SAG ELV Slovensko and Others* (C-599/10, EU:C:2012:191, paragraph 40); and of 10 October 2013, *Manova* (C-336/12, EU:C:2013:647, paragraphs 32 to 36).

7 — Judgment of 29 March 2012, *SAG ELV Slovensko and Others* (C-599/10, EU:C:2012:191, paragraph 38).

8 — Judgment of 6 November 2014, *Cartiera dell’Adda* (C-42/13, EU:C:2014:2345, paragraph 45).

9 — See, by analogy, judgment of 6 November 2014, *Cartiera dell’Adda* (C-42/13, EU:C:2014:2345, paragraph 45), where changes regarding the identity of the person designated as technical director were considered to be more than merely formal and, as such, constituted a sufficient basis to exclude the tenderer.

10 — See, by analogy, Opinion of Advocate General Mengozzi in *MT Højgaard and Züblin* (C-396/14, EU:C:2015:774, point 80 et seq.).

to replace the consortium as a preselected bidder in the procedure. That change was accepted and Aarsleff went on to win the contract. The award was challenged before the national courts and a question referred to this Court on the compatibility with the principle of equal treatment of a change in consortia composition.

33. In its judgment the Court stated that rules about changes in the composition of consortia during tender procedures are generally a matter for the Member States.[11] However, in order to ensure respect of the principle of equal treatment, Aarsleff must have been in a position to meet the preselection criteria on its own merits.[12]

34. Similarly, where a contracting authority requires a tenderer to remove items from its list of experience, it can of course continue to rely on the remaining items. However, it cannot add to the list new, third-party experience.[13]

35. I therefore propose to reply to the national court's first question in the sense that an economic operator cannot rely on third-party experience for the first time after the submission deadline. Given that response, the national court's second and third questions (relating to the conditions under which evidence of such third-party experience can be submitted) largely fall away. Indeed, where an operator cannot rely on a third party at all, it would make no sense for it to present undertakings by that third party, or evidence of the third party's experience.

36. In the light of the foregoing, I propose to provide the following answer to the national court's first three questions:

Article 51 of Directive 2004/18, in conjunction with the principle of equal and non-discriminatory treatment of economic operators and the principle of transparency set out in Article 2 thereof, do not allow an economic operator, when clarifying or supplementing documents, to refer to the performance of contracts by third parties, which it did not refer to in the list of supplies attached to the tender, or to submit an undertaking by such third party to put its resources at the disposal of the tenderer.

B – *Question 4*

37. The fourth question relates to the fact that, in the main case, the tender specifications require tenderers to have performed 'at least two contracts' each covering the white and grey sectors, as set out above, in point 13 of this Opinion. Following the contracting authorities' request for clarification, KK listed the two Medinet Supplies and the Nowy Sącz Supply.

38. Against that backdrop, the national court in essence seeks to determine whether the experience resulting from the Medinet Supplies and the Nowy Sącz Supply can be relied on to fulfil the requirement of 'at least two contracts' having been performed, in compliance with Articles 44 and 48(2)(a) of the Directive and the principle of equal treatment in Article 2 of the Directive.

11 — Judgment of 24 May 2016, *MT Højgaard and Züblin* (C-396/14, EU:C:2016:347, paragraph 35).

12 — See also judgment of 23 January 2003, *Makedoniko Metro and Michaniki* (C-57/01, EU:C:2003:47). In that case, a bidding consortium had sought to *expand* its membership following the submission of tenders. It was formally precluded from doing so by national law. The Court concluded that such a prohibition was compatible with Council Directive 92/50/EEC **of 18 June 1992 relating to the coordination of procedures for the award of public service contracts** (OJ 1992 L 209 p. 1) (predecessor of Directive 2004/18).

13 — Although not the issue in the present case, I do not exclude the possibility that the tenderer could be permitted to rely on other experience *of its own*.

39. The text of the Directive makes it clear that, in the context of public tenders, economic operators may as a general rule rely on the capacities of other entities.[14] That general rule is also consistent with the objective of opening up public contracts to competition[15] and has been iteratively confirmed by the Court.[16] Capacities relied on by an operator can therefore be 'fragmented' or 'split' among different actors, provided of course that the operator will in practice have at its disposal the necessary resources of those other entities.[17]

40. Nonetheless, in order to ensure 'minimum capacity requirements' or 'minimum levels of ability',[18] reliance on third parties may exceptionally be limited. That is so in the case of 'works with special requirements necessitating a certain capacity which cannot be obtained by combining the capacities of more than one operator, which, individually, would be inadequate'. Such requirements must be 'related and proportionate to the subject matter of the contract at issue'.[19]

41. In the present case, the tender specifications require 'at least two contracts' covering a specific field (HIS). It follows from the points discussed above that that requirement can be imposed as a minimum, and exclude reliance on third parties, provided that it is 'related and proportionate to the subject matter of the contract at issue'.

42. Whether or not that is the case is a question of fact for the national court to decide.

43. Nonetheless, the national court implies that there is a qualitative difference between tender specifications that require, on the one hand, accumulated, repeat experience in one area and, on the other, experience in a series of discrete fields.

44. I agree that there is, intuitively, such a difference. Combining experience from different sectors is not always possible — cross-sectoral experience or full experience of integrated systems may be irreplaceable. However, such interdisciplinary combinations are arguably less problematic than simply adding up years of experience or single contracts. A company executing a second contract in the same field will do so against the backdrop of its previous experience, potentially with new and different insights.[20]

45. Ultimately, however, the legal rule remains the same in both cases. The extent to which experience of one operator having performed two contracts is substitutable by two operators having performed one contract each is a question of fact for the national court to determine.

14 — See, for example, Article 4(2) (recourse to consortia), Article 25 (subcontracting) and Article 48(3) (reliance on third parties) of the Directive.

15 — See judgment of 10 October 2013, *Swm Costruzioni 2 and Mannocchi Luigino* (C-94/12, EU:C:2013:646, paragraph 34 and the case-law cited).

16 — See, for example, judgments of 10 October 2013, *Swm Costruzioni 2 and Mannocchi Luigino* (C-94/12, EU:C:2013:646, paragraphs 30 to 32); of 2 December 1999, *Holst Italia* (C-176/98, EU:C:1999:593, paragraphs 26 and 27); and of 18 March 2004, *Siemens and ARGE Telekom* (C-314/01, EU:C:2004:159, paragraph 43).

17 — Article 48(3) of the Directive.

18 — See Article 44(2) of the Directive.

19 — Judgment of 10 October 2013, *Swm Costruzioni 2 and Mannocchi Luigino* (C-94/12, EU:C:2013:646, paragraph 35), reflecting the wording of Article 44(2) of the Directive.

20 — To illustrate that point, if I seek to hire a lawyer with nine years' experience in tax, company, and commercial law, I may accept three lawyers, each with nine years' experience in respectively, tax, company, and commercial law. However, I may be more hesitant about hiring three lawyers each with three years' experience in all three fields combined. And I would certainly not hire nine lawyers with one year's experience each.

46. In its question, the national court states explicitly that the relevant experience and performance of the contract 'cannot be divided'. That implies that the national court has already concluded that (a) the possibility of joint reliance on experience has been excluded and (b) that exclusion is 'related and proportionate to the subject matter of the contract at issue'. To the extent that that is indeed the case, the provisions of the Directive cited by the national court allow the contracting authority to exclude reliance on the resources of another entity by combining the knowledge and experience of two entities.

47. In the light of the above, I propose to reply to the national court's fourth question as follows:

Article 44 of Directive 2004/18, in conjunction with Article 48(2)(a) and the principle of equal treatment in Article 2 thereof, do not allow an economic operator to rely, in the sense of Article 48(3) of that directive, on the knowledge and experience of another entity, where such reliance has been expressly excluded by the contracting authority. However, any such exclusion must be related and proportionate to the subject matter of the contract at issue.

C – *Question 5*

48. By its fifth question, the national court requests clarification of the conditions under which an economic operator may rely on prior experience obtained by a group of companies of which it was a member. That question relates to the fact that, in the main case, the Nowy Sącz Supply and the Słupsk Supply were both carried out by a consortium of two companies, KK and KIT. I understand then that the national court is seeking to determine whether KK can rely on that experience unconditionally to support its bid, or whether the role KK played in the supply is material.[21]

49. I consider that the specific role and associated experience of a consortium member is indeed crucial.

50. Articles 44 and 48(2)(a) of the Directive foresee the assessment of bids on the basis of, among others, experience, as evidenced by lists of works and supplies carried out in recent years. Having the experience necessary to execute a contract is obviously not the same as knowing someone who does. Similarly, experience cannot be acquired simply by being formally a party to a contract or of a consortium.

51. The referring court aptly illustrates that point with the example of a consortium of three companies constructing a motorway: a bank (financing the operation), a construction company (doing the actual building) and a service provider (providing legal, administrative and accounting support). Clearly financing such an operation does not provide the bank with the experience necessary to build a motorway.

52. Ultimately, however, each company's precise role and the experience it obtains depend on specific circumstances. It is possible, for example, that the bank took the lead on financing, but that the service provider was closely associated with that part of the operation, thus gaining some level of experience in that field. Such a level of experience might be entirely appropriate and sufficient in the context of another tender procedure for a different project. Or it might not be. These are questions of fact.

53. Similarly, the precise role played by KK in the Nowy Sącz Supply (and the Słupsk Supply)[22] and whether that corresponds to the requirement of experience in the tender notice is a question of fact for the national court.

21 — It is clear from the request that KK does not in any way seek to rely on KIT's experience as an "other entity" in the sense of Article 48(3) of the Directive, but rather presents experience gained within the consortium as its own.

22 — It was confirmed by Województwo Lódzkie at the oral hearing that KK no longer formally relies on the Słupsk Supply.

54. Finally, the above observations relate to a situation where an economic operator presents previous supplies carried out by a group of operators *specifically as its own experience*. Those observations are without prejudice to the possibility for an economic operator to rely on the capacities of third parties, as provided for, for example, in Article 48(3) of the Directive and discussed in more detail above at point 39.

55. In the light of the foregoing, I propose to respond to the national court's fifth question as follows:

Articles 44 and 48(2)(a) of Directive 2004/18 must be interpreted in such a way that an economic operator, which has performed a contract as one of a group of economic operators, can rely as its own experience only on the experience it has acquired itself in the performance of that contract. That conclusion is without prejudice to the possibility for the economic operator to rely on the capacities of third parties, under the conditions provided for in the Directive.

D – *Question 7*

56. The seventh question relates to the fact that, in the main case, the Słupsk Supply consisted of two separate contracts conferring complementary experience (in the white and grey sectors), whereas the contract notice and tender documents refer to contracts involving both the white and grey areas together. [23]

57. Against that background, the national court requests clarification of the conditions under which experience acquired in the context of two separate contracts can be presented jointly, in order to satisfy a requirement that was not explicitly presented as being divisible.

58. For reasons developed further below, I consider that the answer to this question is that operators should generally be able to draw together 'fragmented' experience in this way. Complete exclusion of such a possibility by the contracting authority should be exceptional.

59. It follows, among others, from the responses proposed to questions 4 and 5 above that the Directive does not dictate precisely how or by whom relevant experience must have been garnered. Thus, subject to certain conditions, it is for example generally possible for an operator to rely on experience acquired: (a) in the context of contracts signed by it alone; (b) in the context of contracts signed by a group of operators of which it forms part; or (c) by third-parties.

60. What is critical is whether the overall experience that the economic operator can genuinely rely on, being either its own or of a third party, is sufficient to carry out the contract.

61. Consequently, the fact that experience has been obtained technically through two or more separate contracts and not a single contractual agreement should normally be immaterial. If the combined experience is sufficient to carry out the contract, that ought to suffice.

62. Indeed, the requirements of a tender can be fulfilled by bringing together capacities or experience split between *different operators*. A fortiori, it would simply be illogical to exclude, as a matter of principle, the possibility of bringing together capacities or experience gained by the *same operator* in relation to *different contracts*.

23 — To the extent that KK would no longer rely on the Słupsk Supply, this question could potentially be considered hypothetical. However, since absence of continued reliance on the Słupsk Supply is unclear from the request for a preliminary ruling, the general presumption of relevance of the question applies.

63. Limitations to the combining of experience of different operators can be imposed where they are ‘related and proportionate to the subject matter of the contract at issue’.[24] In my view, that reasoning and those limitations can be applied by analogy to the fragmentation of experience over different contracts executed by the same operator. Thus, for example, a contracting authority may, in principle, state that certain requirements of experience can only be satisfied by relying on individual contracts which each involve experience from different areas. However, such a requirement must also be necessary, proportionate and related to the subject matter of the contract.

64. It is up to the referring court to determine whether the experience being requested in the specific tender at issue fulfils those conditions. However, the following general points are worth highlighting.

65. First, tenders should, in principle, be open to competition.[25] Reflecting that purpose, exclusion of reliance on third-party experience is the exception. Exclusion of ‘fragmented’ experience should be too. As a result, in the absence of any such exclusion in the contract notice or specifications, that exclusion cannot simply be assumed. It must be clearly stated.

66. Second, the national court specifically refers to Article 2 of the Directive that sets out also the principle of equal treatment. In my opinion, the latter should not raise any concerns in respect of the joint reliance on experience gained in separate contracts to the extent that either (a) *any* economic operator submitting a tender is, in principle, allowed jointly to rely on such contracts; or (b) *no* economic operators can do so (where such a possibility has been excluded by the contracting authority).

67. Third, to the extent that joint reliance has not been excluded, it falls to the contracting authority, subject to review by the national courts, to determine whether the combined experience of two or more contracts is, in a concrete case, sufficient to satisfy the requirements laid down in the tender specifications. Indeed, even where two or more contracts can in principle be combined, it may be that in a specific case the overall experience is simply inadequate. In making this assessment, all relevant elements should be taken into account, including, for example, the relationship between the various contracts[26] and the specific requirements.[27]

68. In the light of the above, I propose to reply to the national court’s seventh question as follows:

Articles 44 and 48(2)(a) of Directive 2004/18, in conjunction with the principle of equal treatment in Article 2 of that directive, allow reliance by an economic operator on experience in such a way that it relies jointly on two or more contractual agreements as a single public contract, unless such joint reliance has been expressly excluded by the contracting authority. Any such exclusion must be related and proportionate to the subject matter of the contract at issue.

E – *Question 6*

69. By its sixth question, the national court asks whether a tenderer can be excluded as being ‘guilty of serious misrepresentation’ (by supplying or failing to supply information) under Article 45(2)(g) of the Directive, irrespective of state of mind. It also asks whether the provision enables exclusion of the tender if the tenderer does not actually meet the tender conditions but has creatively presented information that is technically correct to give the impression of meeting the conditions.

24 — See above, point 40.

25 — See above point 25.

26 — Any formal links between the contracts and similarities in terms of scope, customer or time period for execution, etc.

27 — Integrated nature of requested service, time period for delivery and any corresponding minimal capacity requirements, etc.

70. The wording of Article 45(2)(g) creates a possibility [28] for a Member State to exclude tenderers in certain cases of misrepresentation. Such misrepresentation can occur where information ‘required’, for example to evidence its abilities, is supplied or is omitted.

71. On the natural meaning of the words, Article 45(2)(g) is therefore concerned with situations where an operator omits or includes certain information that leads the contracting authority to have an incorrect understanding of its abilities.

72. Not every misrepresentation constitutes grounds for exclusion. Use of the words ‘serious’ or ‘seriously’ implies that the mere provision of incorrect information is insufficient to trigger Article 45(2)(g) and that a certain threshold of seriousness must be met.

73. However, it is unclear how to establish seriousness. Comparison of different language versions only increases ambiguity in this regard. In some language versions the word connoting gravity or seriousness attaches to the term ‘guilty’, [29] which could arguably be read as requiring a certain state of mind or degree of negligence. In other language versions, the word connoting gravity or seriousness attaches to the misrepresentation, implying that the focus is on the act itself and/or its consequences. [30]

74. The final paragraph of Article 45(2) of the Directive may provide some assistance. It requires Member States to specify under national law the ‘implementing conditions’ of Article 45(2). Thus, Article 45(2)(g) may be read as laying down minimum conditions to establish misrepresentation that is serious enough to allow Member States to exclude a tenderer. It does not, however, seek to fully harmonise the notion. [31] This reading also corresponds with a narrow reading of the grounds for exclusion and the need to evaluate each operator’s case on an individual basis.

75. What does that minimum degree of seriousness correspond to? For the following reasons, I consider that ‘seriousness’ should relate to the (objective) consequences of the provision or omission of information, irrespective of the (subjective) state of mind or intent of the person providing them.

76. In my view, *only* acts or omissions that result in a competitive advantage that keeps an operator in the tender procedure, when it would otherwise not stay in it, can fall under Article 45(2)(g). [32] In other words, where a misrepresentation (by provision or omission of information) is incapable of having an effect on the outcome, it cannot constitute a valid justification to exclude the operator. I refer to this hereafter as the ‘Outcome Condition’.

28 — ‘Any economic operator *may* be excluded …’ (emphasis added).

29 — In French, Italian, Spanish and Dutch respectively: ‘gravement coupable’; ‘gravamente colpevole’; ‘gravamente culpable’; ‘in ernstige mate schuldig’.

30 — In English, German and Czech respectively: ‘guilty of serious misrepresentation’; ‘in erheblichem Maße falscher Erklärungen schuldig’; ‘který se dopustil vážného zkreslení‘. Yet other language versions, notably the Slovak one, omit any reference to gravity at all, be it in relation to state of mind or the consequences of the act — ‘bol uznaný vinným zo skresľovanie skutočností’.

31 — See also Article 45(2)(d) of the Directive which foresees possible exclusion where economic operators are ‘guilty of serious professional misconduct’. As observed by the Commission, the Court’s case-law interpreting that provision refers to the role of the Member States in defining that notion but also to the need for a minimum degree of seriousness before the provision can be triggered.

32 — Which materially affect, for example, preselection or the contract award.

77. That reading is supported by language versions that emphasise the seriousness of the misrepresentation. It can be seen as compatible with versions that emphasise seriousness of 'guilt'. It also reflects the objective of openness to competition and is in line with a narrow reading of the grounds for exclusion. If a tenderer is the best placed to execute the contract, whether on the basis of best price or most advantageous offer,[33] then excluding it would go against the purpose of the Directive to ensure contracts are awarded on the basis of objective criteria, obtaining the best value for money.[34]

78. It follows that the Outcome Condition is a condition *sine qua non* for any exclusion on the basis of misrepresentation.

79. Moreover, I consider that Article 45(2)(g) can in theory be triggered in *every case* where the Outcome Condition is met. Indeed, if the provision or omission of certain information can affect the outcome, it is already *serious in itself*. In that regard, it may be that in particular circumstances an 'obvious' or 'minor' mistake or 'mere clerical error' could have the unexpected consequence of materially changing the outcome of a tender. Such errors may be entirely unintentional. However, they are clearly not minor or trivial mistakes in the eyes of a competitor that loses a tender or is put at a significant disadvantage as a result.

80. I therefore consider that fulfilment of the Outcome Condition alone is *sufficient to allow exclusion* for misrepresentation, without the need for further conditions to be met. This reading of the notion of misrepresentation, namely, freed of any subjective elements of intent on the part of the tenderer, under Article 45(2)(g), is supported by three further arguments.

81. First, Article 45(2)(g) of the Directive does not even refer to state of mind generally, or intention, recklessness or negligence specifically, let alone attempt to flesh out those notions. Under such conditions, it is inappropriate to attempt to define the scope of Article 45(2)(g) on the basis of such complex notions that would effectively have to be pulled out of thin air. That fact alone pleads for an objective reading of the provision, such as the one I have suggested here. Moreover, Article 45(2) only sets out the basic conditions under which EU law creates a *possibility* to exclude tenderers. In doing so, it explicitly refers to national law to specify the conditions of implementation, which might involve, for example, notions of negligence or intention in national law.

82. Second, this relates to a practical point: could it really reasonably be expected that an administrative authority in the context of a public procurement procedure, often acting under significant time pressure and potentially faced with a number of voluminous submissions, should be asked to inquire into and to establish corporate intent? It is quite clear that such a proposition is not a workable one.

83. Third, even if an administrative authority were able to ascertain corporate intent, how useful would it in fact be? Operators participating in tenders are generally expected to exercise due diligence.[35] A professional is simply presumed to know and act with due care. This implies that in addition to intent, other forms of negligence would also likely be considered. Should that indeed be the case, then state of mind would in fact not constitute any genuine distinguishing criterion.

84. The Outcome Condition is therefore a condition *sine qua non* and is also sufficient on its own to trigger Article 45(2)(g). However, that only opens up the *possibility* for Member States to exclude an operator. In accordance with the final paragraph of Article 45(2), it is at the national level that the detailed conditions under which operators should in practice be excluded is determined.

33 — See Article 53(1) of the Directive.

34 — See, for example, recital 46 of the Directive.

35 — See judgment of 29 March 2012, *SAG ELV Slovensko and Others* (C-599/10, EU:C:2012:191, paragraph 38).

85. By way of a final remark in relation to Article 45(2)(g) of the Directive, the national court has explicitly raised the question of whether that provision can be triggered by *correct* information that is presented in a tendentious way. In other words, in a way that makes it look like the requirements of the tender are satisfied, when in reality they are not. The national court's question in this regard envisages a situation where an operator does not fulfil the tender requirements.

86. In such a situation the operator would normally be excluded, simply because it does not fulfil the tender requirements. Such a tenderer should only continue in the procedure if its tender is modified in such a way that it *does* fulfil the requirements. It is also only in such a scenario that exclusion on the basis of Article 45(2)(g) of the Directive would need to be considered at all.

87. As set out in my assessment of question 1, there are clearly limits to acceptable post-deadline tender modifications. Such limits may very well be exceeded where modifications make a major difference such as the one at hand (that is, the difference between non-fulfilment of the tender requirements before the modification, and fulfilment of those requirements after the modification).

88. However, assuming that such modifications are possible in theory could the relevant operator nonetheless be excluded for misrepresentation in its initial bid?

89. I consider that the answer to that question is yes, such an operator could *potentially* be excluded. That is because (a) it initially failed to provide information that is required under Article 48(2)(a) (which is one of the types of misrepresentation referred to in Article 45(2)(g) of the Directive) and (b) that omission was material in the sense that it could have an effect on the outcome of the tender (Outcome Condition).

90. The issue is therefore less that the operator arguably engaged in some 'borderline marketing' of its actual experience. Rather it is that, no matter how its experience was dressed up, the operator initially omitted to provide the 'required' information under Article 48(2)(a), and subsequent provision of that information changed the outcome of the tender.

91. In the light of the foregoing, I propose to reply to the national court's sixth question as follows:

An economic operator can be found guilty of serious misrepresentation under Article 45(2)(g) of Directive 2004/18 only in cases where the alleged misrepresentation can affect the decision of the contracting authority by keeping it in the procedure when it would otherwise not be. Application of that provision is conditional upon the supply or failure to supply information required under Chapter VII, Section 2 of Directive 2004/18. Application of Article 45(2)(g) of that directive is not conditional on the supply of factually incorrect information or any specific state of mind of the economic operator.

V – **Conclusion**

92. I propose that the Court answers the questions referred to it by the Krajowa Izba Odwoławcza (National Appeals Chamber) as follows:

Questions 1-3:

Article 51 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 ('Directive 2004/18'), in conjunction with the principle of equal and non-discriminatory treatment of economic operators and the principle of transparency set out in Article 2 thereof, do not allow an economic operator, when clarifying or supplementing documents, to

refer to the performance of contracts by third parties, which it did not refer to in the list of supplies attached to the tender, or to submit an undertaking by such third party to put its resources at the disposal of the tenderer.

Question 4:

Article 44 of Directive 2004/18, in conjunction with Article 48(2)(a) and the principle of equal treatment in Article 2 thereof, do not allow an economic operator to rely, in the sense of Article 48(3) of that directive, on the knowledge and experience of another entity, where such reliance has been expressly excluded by the contracting authority. However, any such exclusion must be related and proportionate to the subject matter of the contract at issue.

Question 5:

Articles 44 and 48(2)(a) of Directive 2004/18 must be interpreted in such a way that an economic operator, which has performed a contract as one of a group of economic operators, can rely as its own experience only on the experience it has acquired itself in the performance of that contract. That conclusion is without prejudice to the possibility for the economic operator to rely on the capacities of third parties, under the conditions provided for in the Directive.

Question 6:

An economic operator can be found guilty of serious misrepresentation under Article 45(2)(g) of Directive 2004/18 only in cases where the alleged misrepresentation can affect the decision of the contracting authority by keeping it in the procedure when it would otherwise not be. Application of that provision is conditional upon the supply or failure to supply information required under Chapter VII, Section 2 of Directive 2004/18. Application of Article 45(2)(g) of that directive is not conditional on the supply of factually incorrect information or any specific state of mind of the economic operator.

Question 7:

Articles 44 and 48(2)(a) of Directive 2004/18, in conjunction with the principle of equal treatment in Article 2 of that directive, allow reliance by an economic operator on experience in such a way that it relies jointly on two or more contractual agreements as a single public contract, unless such joint reliance has been expressly excluded by the contracting authority. Any such exclusion must be related and proportionate to the subject matter of the contract at issue.