Reports of Cases

OPINION OF ADVOCATE GENERAL
WATHELET
delivered on 3 March 2016[1]

Case C-46/15

Ambisig — Ambiente e Sistemas de Informação Geográfica SA
v
AICP — Associação de Industriais do Concelho de Pombal

(Request for a preliminary ruling from the Tribunal Central Administrativo Sul (Central Administrative Court, Southern Division, Portugal))

(Reference for a preliminary ruling — Public contracts — Directive 2004/18/EC — Article 48(2)(a)(ii) — Direct effect — Award procedures — Economic operators — Technical and/or professional abilities — Evidence)

I – **Introduction**

1. This request for a preliminary ruling has arisen in an action between Ambisig — Ambiente e Sistemas de Informação Geográfica, SA ('Ambisig') and AICP — Associação de Industriais do Concelho de Pombal ('AICP').

2. It concerns the interpretation of the second indent of Article 48(2)(a)(ii) 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.[2]

3. This provision deals with evidence of the technical and/or professional abilities of operators interested in the contract at issue. By the questions referred for a preliminary ruling, the Tribunal Central Administrativo Sul (Central Administrative Court — Southern Division, Portugal) asks the Court about the possible direct effect of the provision and the structuring of the detailed evidential rules laid down therein.

II – **Legal framework**

A – *EU law*

4. Title II of Directive 2004/18 lays down the rules applicable to public contracts. The criteria for qualitative selection are fleshed out in Section 2 of Chapter VII which includes, inter alia, Articles 45 and 48.

1 — Original language: French.
2 — OJ 2004 L 134, p. 114.

5. Article 45(2)(g) of Directive 2004/18 provides that any economic operator who 'is guilty of serious misrepresentation in supplying the information required under this Section or has not supplied such information' may be excluded from participation in the contract in question.

6. Article 48 of Directive 2004/18, entitled 'Technical and/or professional ability' is worded as follows:

'1. The technical and/or professional abilities of the economic operators shall be assessed and examined in accordance with paragraphs 2 and 3.

2. Evidence of the economic operators' technical abilities may be furnished by one or more of the following means according to the nature, quantity or importance, and use of the works, supplies or services:

…

(ii) a list of the principal deliveries effected or the main services provided in the past three years, with the sums, dates and recipients, whether public or private, involved. Evidence of delivery and services provided shall be given:

— where the recipient was a contracting authority, in the form of certificates issued or countersigned by the competent authority,

— where the recipient was a private purchaser, by the purchaser's certification or, failing this, simply by a declaration by the economic operator;

…'

B – *Portuguese law*

1. The Public Procurement Code

7. Directive 2004/18 was transposed into Portuguese law by the Public Procurement Code (Código dos Contratos Públicos), approved by Decree-Law No 18/2008 of 29 January 2008, as amended and republished as an annex to Decree-Law No 278/2009 of 2 October 2009 (Diário da República, 1re série, No 192 of 2 October 2009; 'the Public Procurement Code').

8. Article 165 of the Public Procurement Code is worded as follows:

'1. The minimum requirements concerning technical ability referred to in point (h) of paragraph 1 of the preceding article must be adapted to the nature of the services forming the subject matter of the contract to be concluded and must describe the circumstances, qualities, characteristics or other factual elements relating to, in particular:

(a) the professional experience of the candidates;

(b) the human, technological, equipment-based or other resources used, in any way, by the candidates;

(c) the organisational model and capacity of the candidates, particularly as regards the management and integration of specialist knowledge, IT support systems and quality control systems;

(d) the ability of candidates to take environmental management measures in the context of performance of the contract to be concluded;

(e) the information appearing in the database of the Instituto da Construção e do Imobiliário, I. P. concerning the traders, where the award of a works contract or a public works concession is involved.

…

5. The minimum requirements concerning technical ability referred to in paragraph 1 and the "f" factor referred to in point (i) of paragraph 1 of the preceding article may not be established in a discriminatory manner.'

2. The contract notice

9. Article 12 of the contract notice provides:

'In order to be selected, the candidates must submit the following application documents:

…

(c) a declaration by the client on headed, stamped paper confirming implementation of the environmental and/or quality management system [required by Article 8 of the contract notice] by the candidate, in accordance with the model declaration in Annex VIII to this contract notice. The declaration must bear a signature certified by a notary, lawyer or other competent entity, specifying the capacity of the person signing.

…

(f) a declaration by the client on headed, stamped paper confirming the implementation of management systems, of development and the bringing into use of an online technology platform, of management software and of coordination measures [required by Article 8 of the contract notice] by the candidate, indicating the relevant amount, in accordance with the model declaration in Annex IX to this contract notice. The declaration must bear a signature certified by a notary, lawyer or other competent entity, specifying the capacity of the person signing; …'

III – **Factual background to the dispute in the main proceedings**

10. According to the order for reference, on 23 April 2013 AICP decided to launch a tendering procedure restricted by prior qualification intended to award a service contract for the implementation of environmental and quality management systems and a technology platform.

11. Under Article 8(1)(a) to (c) of the contract notice, candidates had to satisfy several cumulative conditions relating to their technical ability.

12. Article 12(1)(c) and (f) of the contract notice stated that, in order to be selected, candidates had to demonstrate that they met these conditions by providing declarations by clients on headed, stamped paper. The declarations also had to bear a signature certified by a notary, lawyer or other competent entity, specifying the capacity of the person signing.

13. In the context of this tendering procedure, on 30 August 2013 AICP approved the final selection report drawn up by the selection board. The report selected 'Índice ICT & Management, Lda.' and excluded the two other applications, including that submitted by Ambisig.

14. For reasons not mentioned in the order for reference, this decision was annulled on 14 November 2013 by judgment of the Tribunal Central Administrativo Sul (Central Administrative Court — Southern Division). The judgment also ordered AICP to adopt, within 20 days, a new decision on the choice of procedure; to issue a new contract notice, with the illegalities that had been held to exist deleted; and to take all associated steps and measures.

15. In accordance with this judgment, on 10 December 2013 AICP decided to launch a new tendering procedure restricted by prior qualification intended to award a service contract for the implementation of environmental and quality management systems and a technology platform in 13 undertakings.

16. At the end of the new selection procedure, on 27 March 2014 AICP's management decided to approve the final selection report drawn up by the selection board which selected 'Índice ICT & Management, Lda.' and excluded Ambisig's application.

17. Ambisig brought an action against that decision before the Tribunal Administrativo e Fiscal de Leiria (Leiria Administrative and Tax Court, Portugal), resulting in the decision being annulled on 11 June 2014. However, Ambisig challenged the ruling before the collegiate formation of the court on the ground that it had wrongly rejected the pleas in law alleging, in particular, that Article 12(1)(c) and (f) of the contract notice was incompatible with the evidential requirements laid down in Article 48 of Directive 2004/18 as well as with the principles of competition, impartiality and proportionality flowing from the Public Procurement Code.

18. By judgment of 6 August 2014, the Tribunal Administrativo e Fiscal de Leiria (Leiria Administrative and Tax Court) rejected Ambisig's complaint and, consequently, confirmed its decision of 11 June 2014. Ambisig decided to challenge the judgment before the Tribunal Administrativo Central Sul (Central Administrative Court — Southern Division).

19. It is in the context of that action that the present request for a preliminary ruling has arisen. The Tribunal Central Administrativo Sul (Central Administrative Court — Southern Division) has some concerns as regards the scope of the evidential requirements laid down in Article 48 of Directive 2004/18 and the conformity of the requirements of the contract notice with this article.

IV – **The request for a preliminary ruling and the procedure before the Court**

20. By decision of 29 January 2015, received at the Court on 5 February 2015, the Tribunal Central Administrativo Sul (Central Administrative Court — Southern Division) therefore decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

'(1) Since Portuguese legislation does not regulate the matters covered by Article 48(2)(a)(ii), second indent, of Directive 2004/18 …, is that provision directly applicable in the Portuguese legal order in the sense that it confers on individuals a right that they may assert against contracting authorities?

(2) Must Article 48(2)(a)(ii), second indent, of Directive 2004/18 be interpreted to the effect that it precludes the application of rules laid down by a contracting authority which do not allow an economic operator to provide evidence of the provision of services by a declaration signed by that operator, unless the latter proves that it is impossible or very difficult to obtain a certification from the private purchaser?

(3) Must Article 48(2)(a)(ii), second indent, of Directive 2004/18 be interpreted to the effect that it precludes the application of rules laid down by the contracting authority, which, on pain of exclusion, require the private purchaser's certification to contain authentication of the signature by a notary, lawyer or other competent entity?'

21. Written observations were submitted by Ambisig, the Portuguese Government and the European Commission. The Portuguese Government and the Commission also presented oral arguments at the hearing which took place on 28 January 2016.

V – **Analysis**

A – *The first question referred*

22. By its first question, the referring court essentially asks whether the second indent of Article 48(2)(a)(ii) of Directive 2004/18 is to be interpreted as meaning that, in the absence of transposition into domestic law, that provision is capable of conferring rights on individuals which they may assert against contracting authorities in the context of proceedings brought before the national courts. It is therefore necessary to determine whether this provision has direct effect.

1. Whether the second indent of Article 48(2)(a)(ii) of Directive 2004/18 has direct effect

23. The conditions for and limits on recognising the direct effect of provisions of a directive are well known. According to the settled case-law of the Court, whenever the provisions of a directive are, so far as their content is concerned, unconditional and sufficiently precise, they may be relied on before the national courts by individuals against the State where the State has failed to transpose the directive into national law within the time-limit or has transposed it incorrectly. [3]

24. A provision of EU law is considered to be unconditional where it sets forth an obligation which is not qualified by any condition, or subject, in its implementation or effects, to the taking of any measure by the institutions of the European Union or by the Member States. [4]

25. In my view, the second indent of Article 48(2)(a)(ii) of Directive 2004/18 satisfies the abovementioned requirements of being unconditional and precise. This provision does not require any additional measure for its implementation in that, first, it provides that evidence of economic operators' technical abilities may be furnished by a list of the principal deliveries effected or the main services provided in the past three years indicating the sums, dates and public or private recipients involved, and, second, states that where the recipient was a private purchaser, evidence of the service provided is to be given by the purchaser's certification or, failing this, simply by a declaration by the economic operator.

26. The Court has, furthermore, already had occasion to hold that Article 26 of Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts [5] could be relied on by an individual before the national courts, 'since no specific implementing measure is necessary for compliance with [the] requirements [set out therein]'. [6] Even though Article 26 of Directive 71/305 only concerned works contracts and not service contracts, the rules on evidence of technical abilities laid down in this provision may be regarded as similar, in so far as they are unconditional and precise, to those of Article 48 of Directive 2004/18.

3 — See, to that effect, among many other examples, judgment in *Portgás* (C-425/12, EU:C:2013:829, paragraph 18 and the case-law cited).

4 — See, to that effect, judgments in *Almos Agrárkülkereskedelmi* (C-337/13, EU:C:2014:328, paragraph 32) and *Larentia + Minerva and Marenave Schiffahrt* (C-108/14 and C-109/14, EU:C:2015:496, paragraph 49).

5 — OJ, English Special Edition 1971 (II), p. 682.

6 — Judgment in *Beentjes* (31/87, EU:C:1988:422, paragraph 43).

27. Lastly, I note that the Court has also held, in general terms, that the provisions of Title VI of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts[7] could be relied on by an individual before a national court 'if it is clear from an individual examination of their wording that they are unconditional and sufficiently clear and precise' (Judgment in *Tögel* (C-76/97, EU:C:1998:432, paragraph 47)).These provisions included Article 32, which even then stated, in paragraph 2 thereof, that evidence of the service provider's technical ability could be furnished by 'a list of the principal services provided in the past three years, with the sums, dates and recipients, public or private, of the services provided [and that] where provided to private purchasers, delivery [was] to be certified by the purchaser or, failing this, simply declared by the service provider to have been effected'.

28. It must be stated that Article 48(2) of Directive 2004/18 reproduces this provision almost word for word. I therefore consider it to be unconditional and sufficiently precise so that it can be relied on before the national courts.

2. The necessity for the contracting authority to be classified as a 'State'

29. However, in order for Ambisig to be able to rely on the second indent of Article 48(2)(a)(ii) of Directive 2004/18 before the national court, it is for the referring court to satisfy itself that the contracting authority in question in the main proceedings is not an 'individual'.

30. According to settled case-law, a directive may not of itself impose obligations on an individual. It cannot therefore be relied upon as such against an individual before a national court.[8]

31. However, although the provisions of a directive having direct effect may, consequently, be relied on only against a State, the capacity in which the State acts is irrelevant.[9]

32. Thus, according to settled case-law, 'the entities against which reliance may be placed on the provisions of a directive that are capable of having direct effect include a body, whatever its legal form, which has been given responsibility, pursuant to a measure adopted by the State, for providing a public-interest service under the control of the State and which has, for that purpose, special powers beyond those which result from the normal rules applicable in relations between individuals'.[10]

33. It appears from the name of the contracting authority in question in the main proceedings that it is a purely private association of undertakings which does not provide any public-interest services and does not have, in any case, special powers to perform its tasks.

34. In response to the questions put by the Court during the hearing held on 28 January 2016, the representative of the Portuguese Government confirmed that AICP was an association governed by private law which did not exercise and had not been entrusted with any tasks in the public interest. He explained that public procurement legislation would only apply if AICP's activities were financed, for the most part, out of the public purse.[11]

7 — OJ 1992 L 209, p. 1.

8 — See, to that effect, judgments in *Marshall* (152/84, EU:C:1986:84, paragraph 48); *Faccini Dori* (C-91/92, EU:C:1994:292, paragraph 20); and *Portgás* (C-425/12, EU:C:2013:829, paragraph 22).

9 — See, to that effect, judgment in *Portgás* (C-425/12, EU:C:2013:829, paragraph 23).

10 — Judgment in *Portgás* (C-425/12, EU:C:2013:829, paragraph 24 and the case-law cited).

11 — Under Article 1(9) of Directive 2004/18.

35. That being said, it is for the Tribunal Central Administrativo Sul (Central Administrative Court — Southern Division) to establish whether, at the time of the facts at issue in the main proceedings, AICP was a body which had been given responsibility for providing, under the control of a public authority, a public-interest service and whether this association of undertakings had, for that purpose, special powers. [12]

36. If the answer is in the negative, the second indent of Article 48(2)(a)(ii) of Directive 2004/18 cannot be relied upon against AICP. In that event, it would nevertheless be for the referring court to apply the principle of interpreting national law in conformity with EU law and to interpret all relevant rules of national law, so far as possible, in the light of the wording and the purpose of Directive 2004/18 in order to achieve the result sought by it and, consequently, comply with the third paragraph of Article 288 TFEU. [13]

B – *The second question referred*

37. By its second question, the referring court asks whether the second indent of Article 48(2)(a)(ii) of Directive 2004/18 precludes the application of rules laid down by a contracting authority which do not allow an economic operator to provide evidence of his technical abilities by a declaration signed by that operator, unless the latter proves that it is impossible or very difficult to obtain a certification from the private purchaser.

38. The referring court therefore asks the Court about the possible order of precedence of the forms of evidence permitted under the second indent of Article 48(2)(a)(ii) of Directive 2004/18.

39. Article 48(2)(a)(ii) of Directive 2004/18 provides that evidence of economic operators' technical abilities may be furnished by a list of the principal deliveries effected or the main services provided in the past three years. If the recipient was a private purchaser, the second indent of this provision provides for two forms of evidence to demonstrate that the transactions (deliveries or services) actually occurred, that is, 'the purchaser's certification or, *failing this*, simply … a declaration by the economic operator'. [14]

40. The Court has repeatedly held that when interpreting a provision of EU law, it is necessary to consider not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it is part. [15]

12 — See, to that effect, judgment in *Portgás* (C-425/12, EU:C:2013:829, paragraph 31).

13 — See, to that effect, judgment in *Dominguez* (C-282/10, EU:C:2012:33, paragraph 24 and the case-law cited). In its judgment in *Fenoll* (C-316/13, EU:C:2015:200), the Court expressly confirmed the existence of an order of precedence as regards the courses of action available in disputes between individuals: 'if national law cannot be interpreted in conformity with the directive [in question] — which it is for the referring court to ascertain — [the relevant article] of that directive may not be invoked in a dispute between individuals … in order to ensure the full effect of [the] right [it confers] and to render inapplicable any conflicting provision of national law. Moreover, in such a situation the party adversely affected by the incompatibility of national law with EU law may nevertheless rely upon the case-law [on the non-contractual liability of the Member States for infringements of EU law] deriving from the judgment in *Francovich and Others* (C-6/90 and C-9/90, EU:C:1991:428) in order to obtain, if appropriate, compensation for any damage suffered (see judgment in *Dominguez*, C-282/10, EU:C:2012:33, paragraph 43)' (paragraph 48). In other words, if, in a dispute between individuals, the national court does not succeed in interpreting national law in conformity with the applicable directive, it will not be able to apply this directive but neither will it be able to disapply the conflicting national law. In those circumstances, the only palliative available to the injured party is to seek to establish the liability of the Member State for infringing EU law.

14 — My emphasis.

15 — See, in particular, judgments in *Yaesu Europe* (C-433/08, EU:C:2009:750, paragraph 24); *Brain Products* (C-219/11, EU:C:2012:742, paragraph 13); *Koushkaki* (C-84/12, EU:C:2013:862, paragraph 34); and *Lanigan* (C-237/15 PPU, EU:C:2015:474, paragraph 35).

41. That said, as Advocate General Trstenjak pointed out in point 37 of her Opinion in *Agrana Zucker* (C-33/08, EU:C:2009:99), 'the wording of a provision … is invariably *the starting point* and at the same time the limit of any interpretation'.[16] I also agree with the clarification provided by Advocate General Léger to the effect that methods of interpretation other than those relating to the wording of a provision are not necessary where the text in question is absolutely clear and unambiguous. 'In that case, the provisions of [EU] law are sufficient in themselves'.[17]

42. In the present case, it must be stated that Article 48(2)(a)(ii) of Directive 2004/18 has the required level of clarity and unambiguity in all language versions.

43. The term 'failing this' used in this provision means 'in the absence of',[18] 'in place of' or even 'for lack of something'.[19] Therefore, the only way in which it can be interpreted is in the sense of establishing an order of precedence. Specifically, the form of evidence which follows the words 'failing this' — namely the declaration by the economic operator — is thus necessarily subsidiary to the preceding form of evidence, namely the purchaser's certification.

44. Some language versions are even more explicit in that they do not simply use wording analogues to 'failing this', but permit the straightforward declaration by the operator expressly in the absence of the purchaser's certification, referred to before.[20]

45. Furthermore, if the economic operator were free to choose the form of evidence from those permitted under the second indent of Article 48(2)(a)(ii) of Directive 2004/18, the words 'failing this' would be meaningless. Indeed, it would always be easier for the economic operator to draw up a declaration himself rather than request a certification from a third party.

46. The economic operator's declaration is therefore a subsidiary form of evidence, to be used where it has not been possible to obtain the purchaser's certification. In those circumstances, it is for the economic operator to show that he was unable to obtain such a certification.

47. Since Article 45(2)(g) of Directive 2004/18 permits the exclusion of an economic operator from a contract if he 'is guilty of serious misrepresentation in supplying the information required under this Section or has not supplied such information', the contracting authority must be in a position to check the veracity of this information or of the reason for its absence.

48. This possibility for the contracting authority to carry out a check is particularly necessary because the Court has already held that, in accordance with the principle of equal treatment and the obligation of transparency flowing from it, to which the contracting authorities are subject under Article 2 of Directive 2004/18, those authorities must 'comply strictly with the criteria which [they have themselves] established, so that [they are] required to exclude from the contract an economic operator who has failed to provide a document or information which he was required to produce under the terms laid down in the contract documentation, on pain of exclusion'.[21]

16 — My emphasis.

17 — Opinion of Advocate General Léger in *Schulte* (C-350/03, EU:C:2004:568, point 88). Also see, by way of an interpretation *a contrario*, judgment in *Tecom Mican and Arias Domínguez* (C-223/14, EU:C:2015:744, paragraph 35).

18 — According to the definition in the dictionary *Le Petit Robert*, 2014.

19 — According to the definition in the dictionary *Larousse.fr*.

20 — See, in particular, the Spanish version in which Article 48(2)(a)(ii) of Directive 2004/18 is worded thus: 'cuando el destinatario sea un comprador privado, mediante un certificado del comprador o, *a falta de este certificado* [failing this], simplemente mediante una declaración del operador económico' (my emphasis). The Italian version also uses the wording 'in mancaza di tale attestazione'. Lastly, in the German version, the EU legislature refers to the situation where 'falls eine derartige Bescheinigung nicht erhältlich ist'. The Greek version is even more explicit in that it refers to the 'impossibility' of obtaining a certification from the purchaser: '*εάν ο αποδέκτης είναι ιδιωτικός φορέας, με βεβαίωση του αγοραστή ή, εάν τούτο δεν είναι δυνατόν* [where this is not possible], *με απλή δήλωση του οικονομικού φορέα*' (my emphasis).

21 — Judgment in *Cartiera dell'Adda* (C-42/13, EU:C:2014:2345, paragraph 42). Also see paragraph 43 of this judgment for reference to the principles of equal treatment and transparency, as well as Article 2 of Directive 2004/18.

49. However, as the Commission points out in its written submissions, this additional requirement must comply with the principle of proportionality.

50. This means that recourse to a declaration by the economic operator cannot be restricted to cases where it is absolutely impossible to obtain a certification from the purchaser (such as in the case of bankruptcy, for example). An impediment to securing such certification, such as a straightforward refusal by the purchaser without giving reasons or a demand by the purchaser for payment in return, could suffice. It also means than the evidence of this impossibility must be assessed in the light of the specific circumstances of each case. Thus, whilst submission of an official document may be required in the case of bankruptcy, a straightforward exchange of letters or a failure to reply (evidenced by one or more reminders, for instance) could be sufficient to demonstrate bad faith on the part of the purchaser.

51. To conclude, I consider that the second indent of Article 48(2)(a)(ii) of Directive 2004/18 does not preclude the application of rules laid down by a contracting authority which allow an economic operator to provide evidence of his technical abilities by a declaration signed by that operator only if he proves that it is impossible or very difficult to obtain a certification from the private purchaser.

C – *The third question referred*

52. By its third question, the referring court asks whether the second indent of Article 48(2)(a)(ii) of Directive 2004/18 precludes the application of rules laid down by a contracting authority which, on pain of exclusion, require the private purchaser's certification to bear a signature certified by a notary, lawyer or other competent entity.

53. The referring court's uncertainty derives from the wording of the second indent of Article 48(2)(a)(ii) of Directive 2004/18 in Portuguese. That provision refers to a 'declaração *reconhecida* do adquirente',[22] that is to say a 'recognised' or 'certified' declaration. No such adjective appears in the other language versions of the second indent of Article 48(2)(a)(ii) of that directive.

54. According to the settled case-law of the Court, the wording used in one language version of a provision of EU law cannot serve as the sole basis for the interpretation of that provision, or be made to override the other language versions in that regard. Provisions of EU law must be interpreted and applied uniformly in the light of the versions existing in all EU languages. Where there is divergence between the various language versions of an EU legislative text, the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms part.[23]

55. This principle of linguistic equality or equivalence does not however go so far as to prevent the Court from disapplying the language version of a provision which is inconsistent with the ordinary meaning shared by the other language versions, on the basis of a contextual and/or teleological interpretation of the provision.[24]

22 — My emphasis.

23 — See, to that effect, judgment in *Léger* (C-528/13, EU:C:2015:288, paragraph 35 and the case-law cited).

24 — See, to that effect, Lenaerts K. and Guttiérrez-Fons J.A., 'To say what the law of the EU is: Methods of interpretation and the European Court of Justice', *Columbia Journal of European Law*, 2014, 20th Anniversary Issue, pp. 3 to 61, especially p. 14 and the authors cited in the footnote on p. 78.

56. In the present case, the ordinary meaning of the wording used in the other language versions clearly does not, in itself, enable a firm reply to be given to the question referred for a preliminary ruling. However, the context of which Article 48 of Directive 2004/18 forms part and its development, as well as its teleological interpretation, lead me to adopt the interpretation that the second indent of Article 48(2)(a)(ii) of Directive 2004/18 does not require the production of a certification from the private purchaser bearing a signature certified by a notary, lawyer or any other competent entity.

1. The wording of the second indent of Article 48(2)(a)(ii) of Directive 2004/18

57. If we compare the different language versions of the second indent of Article 48(2)(a)(ii) of Directive 2004/18, we see that although the qualifier 'reconhecida' ('recognised' or 'certified') only appears in the Portuguese version, this is also the only version which uses the same word for both forms of evidence envisaged.

58. In the other language versions, the word 'declaration' is used in the second situation (the declaration by the economic operator) whilst the first situation refers to the purchaser's 'certification' of deliveries or services. Thus, in the Spanish, German, English and French versions, we find the words 'certificado' and 'declaración', 'Bescheinigung' and 'Erklärung', 'certification' and 'declaration', and 'certification' and 'déclaration'. [25]

59. The use of a different word for each of the two situations referred to in the second indent of Article 48(2)(a)(ii) of Directive 2004/18 could reflect the EU legislature's intention to distinguish between the burden of proof applying to them. The distinction between 'certification' and 'declaration' would thus connote the idea of a higher level of formality in the first situation. This interpretation would be confirmed by the wording of the provision in Portuguese, which uses the word 'declaration' in both situations but with the addition of the adjective 'recognised' or 'certified' only in the first.

60. However, I cannot completely disregard the fact that the second indent of Article 48(2)(a)(ii) of Directive 2004/18 permits evidence of the services which the economic operator claims to have provided to be given by *the purchaser's* certification, without reference to any official document or the involvement of a third party. In the absence of such a detail, the ordinary meaning of the word 'certification' is nothing more than the act of giving a written assurance of something . [26]

61. I must therefore conclude that a literal analysis of the provision in question does not, in itself, enable it to be interpreted with the required level of certainty.

2. Systematic interpretation of the second indent of Article 48(2)(a)(ii) of Directive 2004/18

62. First of all, the Court has consistently held that Article 48 of Directive 2004/18 establishes a closed system which limits the methods of assessment and verification available to contracting authorities and, therefore, limits *their opportunities to lay down requirements*. [27]

25 — I note that the Slovakian version uses the words 'potvrdením', which may be translated as 'confirmation' rather than 'certification', and 'vyhlásením'.

26 — According to the dictionary *Le Petit Robert*, 2014, certification is, in the first place, a legal term meaning 'an assurance given in writing'. In Spanish, according to the online dictionary of the Real Academia Española, the entry for 'certificado' refers to the word 'certificación', which may be defined as a document in which an assurance is given as to the veracity of a fact.

27 — See, to that effect, judgment in *Édukövízig and Hochtief Construction* (C-218/11, EU:C:2012:643, paragraph 28).

63. The Court has also stated that even within the framework of an open system (such as that laid down in Article 47(4) of Directive 2004/18 as regards the economic and financial standing of candidates), contracting authorities' freedom is not unlimited and the aspects chosen must be 'objectively such as to provide information on such standing … without, however, going beyond what is reasonably necessary for that purpose'. [28]

64. The same considerations apply, *a fortiori*, to the requirements laid down in the closed evidential system under Article 48 of Directive 2004/18. In my opinion, requiring authentication of the signature of a private purchaser attesting to a delivery effected or a service provided by an economic operator who has applied for a contract goes beyond what is necessary to prove the technical ability of the operator in question and is excessively formalistic when compared to the straightforward declaration by the economic operator, which is the subsidiary form of evidence permitted under the second indent of Article 48(2)(a)(ii) of Directive 2004/18.

65. If the contracting authority has concerns about the veracity of the document submitted to it, it may also, in my view, request additional information to demonstrate the authenticity of the certification provided. Indeed, as part of the contextual analysis, it must be recalled that Article 45(2)(g) of Directive 2004/18 makes it possible to exclude from the contract any operator who 'is guilty of serious misrepresentation in supplying the information required'.

66. Secondly, the development of the applicable legislation also militates in favour of a non-formalistic interpretation of the necessary certification.

67. The idea underpinning the second indent of Article 48(2)(a)(ii) of Directive 2004/18 was already present in Directive 92/50, although the wording used was slightly different. Under the second indent of Article 32(2)(b) of Directive 92/50, the delivery on which the economic operator relied to prove his technical ability had to be 'certified *by the purchaser*'. [29]

68. Whilst the idea of 'certification' is found in the verb 'to certify', the absence of any involvement of institutional third parties was, by contrast, even clearer, as the emphasis was patently on the actions of the purchaser, the delivery having to be certified *by* him.

69. It can also be noted that the Portuguese version of Directive 92/50 used the word 'declaração' even then for both evidential situations, but without the addition of any adjective in the first situation.

70. The wording of Article 32(2) of Directive 92/50 was not, initially, the subject of any amendments in the proposal for a Directive of the European Parliament and of the Council on the coordination of procedures for the award of public supply contracts, public service contracts and public works contracts (COM/2000/0275 final) [30] resulting in Article 48(2) of Directive 2004/18.

71. It was only after the inclusion of the Parliament's amendments regarding economic operators tendering as a group and concerns relating to the environment and workers' health and safety that the second indent of Article 48(2)(a)(ii) took on its current form. [31]

28 — Judgment in *Édukövízig and Hochtief Construction* (C-218/11, EU:C:2012:643, paragraph 29).

29 — My emphasis.

30 — OJ 2001 C 29 E, p. 11. See Article 49(3) of the proposal.

31 — See the amended proposal for a European Parliament and Council Directive concerning the coordination of procedures for the award of public supply contracts, public service contracts and public works contracts (COM/2002/0236 final), OJ 2002 C 203 E, p. 210, especially pp. 223 and 224.

72. It is therefore not possible to base any argument on the amendments to the wording of the disputed provision, as the considerations which resulted in those changes are unrelated to any intention on the part of the legislature to increase the evidential formalities associated with the certification, by the purchaser, of the services provided by the economic operator.

73. On the contrary, Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/ [32] goes even further in the sense of reducing evidential formalities by removing all references to certification by the purchaser.

74. From now on, Article 60(4) of that directive — which replaces Article 48(2) of Directive 2004/18 — simply provides that 'evidence of the economic operators' technical abilities may be provided by one or more of the means listed in Annex XII Part II, in accordance with the nature, quantity or importance, and use of the works, supplies or services'.

75. Under Annex XII Part II(a)(ii) of Directive 2014/24, the means of evidence attesting to economic operators' technical abilities are 'a list of the principal deliveries effected or the main services provided over at the most the past three years, with the sums, dates and recipients, whether public or private, involved. Where necessary in order to ensure an adequate level of competition, contracting authorities may indicate that evidence of relevant supplies or services delivered or performed more than three years before will be taken into account'. The need for this list to be accompanied by a certification from the purchaser has therefore disappeared.

76. Even though Directive 2014/24 does not apply to the dispute in the main proceedings, this new directive, which repeals Directive 2004/18, is relevant in that it expresses the current intention of the EU legislature. It may therefore be of assistance in ascertaining the current meaning of an earlier, similar provision, provided, however, that such interpretation is not *contra legem*.

77. In the present case, it seems to me that Directives 92/50 and 2014/24 confirm the EU legislature's continuing intention not to make evidence of the technical ability of an economic operator subject to any specific formality and do so in a way that does not conflict with the wording of the applicable provision.

78. In other words, viewed in its context and from a historical perspective, the second indent of Article 48(2)(a)(ii) of Directive 2004/18 imposes no other requirement than the assurance or confirmation, by the purchaser, that the service on which the economic operator relies with a view to securing the contract was actually provided.

3. Teleological interpretation of the second indent of Article 48(2)(a)(ii) of Directive 2004/18

79. This interpretation is also consistent with the purpose of Directive 2004/18, which is to facilitate freedom of movement of goods, freedom of establishment and freedom to provide services as well as, more generally, the opening-up of public procurement to competition. [33]

80. Making the acceptance of a purchaser's certification conditional on its authentication by a notary, lawyer or any other competent entity is, to my mind, likely to run counter to that objective.

81. Such a requirement would be liable to deter some potential candidates who, when faced with the practical difficulty (due to the time-limits set in the contract notice, for example) of satisfying this additional condition, would forgo submitting a tender.

32 — OJ 2014 L 94, p. 65.

33 — See recital 2 in the preamble to Directive 2004/18.

4. Conclusion on the third question referred for a preliminary ruling

82. To conclude, I find that the contextual and teleological interpretations of the second indent of Article 48(2(a)(ii) of Directive 2004/18 confirm the ordinary meaning of the term 'certification' appearing therein and it is not appropriate to draw specific inferences from the addition of the word 'reconhecida' in the Portuguese version.

83. The context of which the second indent of Article 48(2)(a)(ii) of Directive 2004/18 forms part and its development, as well as its teleological interpretation, lead me to adopt the interpretation that the word 'certification' or the term 'certified declaration' used in the Portuguese version do not require any particular formality.

84. Consequently, I consider that the second indent of Article 48(2)(a)(ii) of Directive 2004/18 precludes the application of rules laid down by a contracting authority which, on pain of exclusion, require the private purchaser's certification to bear a signature certified by a notary, lawyer or other competent entity.

VI – **Conclusion**

85. In the light of the foregoing considerations, I propose that the Court give the following replies to the questions referred for a preliminary ruling by the Tribunal Central Administrativo Sul (Central Administrative Court — Southern Division):

(1) The second indent of Article 48(2)(a)(ii) 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 must be interpreted as meaning that, in the absence of transposition into domestic law, that provision is capable of conferring rights on individuals which they may assert against contracting authorities in the context of proceedings brought before the national courts, provided that the contracting authority in question falls within the notion of State within the meaning of the case-law of the Court.

(2) The second indent of Article 48(2)(a)(ii) of Directive 2004/18 does not preclude the application of rules laid down by a contracting authority which allow an economic operator to provide evidence of his technical abilities by a declaration signed by that operator only if he proves that it is impossible or very difficult to obtain a certification from the private purchaser.

(3) The second indent of Article 48(2)(a)(ii) of Directive 2004/18 precludes the application of rules laid down by a contracting authority which, on pain of exclusion, require the private purchaser's certification to bear a signature certified by a notary, lawyer or other competent entity.