



## Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

7 July 2016\*

(References for a preliminary ruling — Public procurement — Directive 2004/18/EC — Article 48(2)(a)(ii), second indent — Technical abilities of economic operators — Direct effect — Means of evidence — Hierarchical relationship between the private purchaser's certification and the tenderer's unilateral declaration — Principle of proportionality — Prohibition on introducing substantive changes to the means of evidence provided for)

In Case C-46/15,

REQUEST for a preliminary ruling under Article 267 TFEU from Tribunal Central Administrativo Sul (Administrative Court of Appeal, South, Portugal), made by decision of 29 January 2015, received at the Court on 5 February 2015, in the proceedings

**Ambisig — Ambiente e Sistemas de Informação Geográfica SA**

v

**AICP — Associação de Industriais do Concelho de Pombal,**

intervener:

**Índice — ICT & Management Lda,**

THE COURT (Fifth Chamber),

composed of J.L. da Cruz Vilaça, President of the Chamber, A. Tizzano (Rapporteur), Vice-President of the Court, F. Biltgen, A. Borg Barthet and M. Berger, Judges,

Advocate General: M. Wathelet,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 28 January 2016,

after considering the observations submitted on behalf of:

- Ambisig — Ambiente e Sistemas de Informação Geográfica SA, by H. Rodrigues da Silva, advogado,
- the Portuguese Government, by L. Inez Fernandes and F. Batista, acting as Agents,
- the European Commission, by G. Braga da Cruz and A. Tokár, acting as Agents,

\* Language of the case: Portuguese.

after hearing the Opinion of the Advocate General at the sitting on 3 March 2016,  
gives the following

### Judgment

- 1 This request for a preliminary ruling 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 (OJ 2004 L 134, p. 114).
- 2 The request has been made in proceedings between Ambisig — Ambiente e Sistemas de Informação Geográfica SA ('Ambisig') and AICP — Associação de Industriais do Concelho de Pombal ('AICP') concerning AICP's decision to exclude Ambisig's application from a tendering procedure with a view to the award of a public service contract.

### Legal context

#### *EU law*

- 3 Recitals 1, 2, 4, 32 and 46 of Directive 2004/18 state:
  - '(1) On the occasion of new amendments being made to Council Directives 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), 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 1999, p. 1) and 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54), which are necessary to meet requests for simplification and modernisation made by contracting authorities and economic operators alike in their responses to the Green Paper adopted by the Commission on 27 November 1996, the Directives should, in the interests of clarity, be recast. ...
  - (2) The award of contracts concluded in the Member States on behalf of the State, regional or local authorities and other bodies governed by public law entities, is subject to the respect of the principles of the Treaty and in particular to the principle of freedom of movement of goods, the principle of freedom of establishment and the principle of freedom to provide services and to the principles deriving therefrom, such as the principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality and the principle of transparency. ...
- [...]
- (4) Member States should ensure that the participation of a body governed by public law as a tenderer in a procedure for the award of a public contract does not cause any distortion of competition in relation to private tenderers.
- ...
- (32) In order to encourage the involvement of small and medium-sized undertakings in the public contracts procurement market, it is advisable to include provisions on subcontracting.

...

(46) Contracts should be awarded on the basis of objective criteria which ensure compliance with the principles of transparency, non-discrimination and equal treatment and which guarantee that tenders are assessed in conditions of effective competition. ...'

4 Article 1(9) of that directive provides:

“Contracting authorities” means the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or one or several of such bodies governed by public law.

A “body governed by public law” means any body:

- (a) established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;
- (b) having legal personality; and
- (c) financed, for the most part, by the State, regional or local authorities, or other bodies governed by public law; or subject to management supervision by those bodies; or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law.

Non-exhaustive lists of bodies and categories of bodies governed by public law which fulfil the criteria referred to in (a), (b) and (c) of the second subparagraph are set out in Annex III. Member States shall periodically notify the Commission of any changes to their lists of bodies and categories of bodies.'

5 Article 48 of that directive, entitled “Technical and/or professional ability”, provides:

‘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:

- (a) (i) ...
- 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 private purchaser, by the purchaser’s certification or, failing this, simply by a declaration by the economic operator;

...’

#### *Portuguese law*

6 Directive 2004/18 was transposed into Portuguese law by the Código dos Contratos Públicos (the Public Procurement Code), approved by Decree-Law No 18/2008 of 29 January 2008, as amended and republished as an annex to Decree-Law No 287/2009 of 2 October 2009 (*Diário da República*, 1st series, No 192, 2 October 2009).

7 Article 165 of that 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.’

### **The dispute in the main proceedings and the questions referred for a preliminary ruling**

- 8 According to the documents in the case-file submitted to the Court, on 10 December 2013, AICIP, in its capacity as the contracting authority, launched a tendering procedure restricted by prior qualification intended to award a service contract for the ‘Implementation of Systems for Environmental Management, Quality and Technology Platform in 13 undertakings’.
- 9 Article 12(1)(c) and (f) of the contract notice provided as follows:

‘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 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 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; ...'

- 10 By decision of 27 March 2014, AICP approved the final report drawn up by the selection board selecting, for the bidding stage, Índice ICT & Management Lda. and excluding, in particular, Ambisig's application on the ground that, first, Ambisig had failed to demonstrate, by means of a private purchaser's declaration certified in accordance with Article 12 of the contract notice, that the requirements for technical abilities had been met and, secondly, it had failed to demonstrate or argue that it was impossible or very difficult for it to produce such a declaration.
- 11 In the action brought by Ambisig against that decision, by judgment of 11 June 2014 the Tribunal Administrativo e Fiscal de Leiria (Leiria Administrative and Tax Court, Portugal) upheld in part the pleas in law relied on by Ambisig, annulled AICIP's decision and ordered AICIP to approve a new contract notice within 20 days.
- 12 Ambisig challenged that judgment before the collegiate formation of that court on the ground that it had wrongly rejected the pleas in law alleging, in particular, that the rules laid down by the contracting authority relating to the evidence of the candidates' technical abilities were incompatible with the requirements laid down in that regard in Article 48 of Directive 2004/18.
- 13 Since the collegiate formation of the Tribunal Administrativo e Fiscal de Leiria (Leiria Administrative and Tax Court) rejected that complaint by judgment of 6 August 2014, Ambisig brought an action before the referring court, on the ground that that judgment had not acknowledged that the rules set by the contracting authority as regards the method of adducing evidence of the candidates' technical abilities were unlawful in the light of Article 48 of Directive 2004/18.
- 14 In those circumstances the Tribunal Central Administrativo Sul (Administrative Court of Appeal, South, Portugal) decided to stay the proceedings and to refer the following questions to the Court of Justice 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?'

## Consideration of the questions referred

### *The first question*

- 15 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, even if not transposed into domestic law, it satisfies the conditions for conferring rights on individuals that they may assert against a contracting authority before the national courts.
- 16 First of all, it should be recalled that, according to settled case-law of the Court, where the State has failed to implement a directive in domestic law by the end of the period prescribed or where it has failed to implement the directive correctly, only the provisions of that directive which appear, so far as their subject-matter is concerned, to be unconditional and sufficiently precise may be relied on by individuals before national courts against the State (see, to that effect, judgments of 12 December 2013 in *Portgás*, C-425/12, EU:C:2013:829, paragraph 18 and the case-law cited; 14 January 2014 in *Association de médiation sociale*, C-176/12, EU:C:2014:2, paragraph 31; and 15 May 2014 in *Almos Agrárkülkereskedelmi*, C-337/13, EU:C:2014:328, paragraph 31).
- 17 It must be found, as the Advocate General observed in point 25 of his Opinion, that the second indent of Article 48(2)(a)(ii) of Directive 2004/18 satisfies those criteria, since, first, it lays down an obligation which is not coupled with any additional requirement or subject to the adoption of an act of the EU institutions or the Member States and, secondly, it states fully and clearly the evidence which may be required from the economic operators in order to prove their technical abilities in public tendering procedures.
- 18 The Court has indeed also ruled to that effect as regards Directive 92/50, which was repealed and replaced by Directive 2004/18.
- 19 Consequently, in paragraphs 46 and 47 of the judgment of 24 September 1998 in *Tögel* (C-76/97, EU:C:1998:432), the Court held that the provisions of Title VI of Directive 92/50 — which included inter alia Article 32(2) of that directive, the content of which was reproduced in the second indent of Article 48(2)(a)(ii) of Directive 2004/18 in almost identical terms — were capable of having direct effect.
- 20 However, it must also be clarified, for the purposes of providing a useful answer to the first question, whether the second indent of Article 48(2)(a)(ii) of Directive 2004/18 may be relied upon against any entity classified as a ‘contracting authority’, within the meaning of Article 1(9) of that directive.
- 21 In that regard, it must be borne in mind that, according to settled case-law of the Court, although a directive cannot of itself impose obligations on an individual and cannot therefore be relied on as such against an individual (see, in particular, judgments of 24 January 2012 in *Dominguez*, C-282/10, EU:C:2012:33, paragraph 37 and the case-law cited, and 15 January 2015 in *Ryanair*, C-30/14, EU:C:2015:10, paragraph 30), where a person is able to rely on a directive not as against an individual but as against the State he may do so regardless of the capacity in which the latter is acting. It is necessary to prevent the State from taking advantage of its own failure to comply with EU law (see, to that effect, judgments of 24 January 2012 in *Dominguez*, C-282/10, EU:C:2012:33, paragraph 38 and the case-law cited, and 12 December 2013 in *Portgás*, C-425/12, EU:C:2013:829, paragraph 23).
- 22 Consequently, the entities against which reliance may be placed on the provisions of a directive that are capable of having direct effect include not only a public entity but also 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 (judgment of 12 December 2013 in *Portgás*, C-425/12, EU:C:2013:829, paragraph 24 and the case-law cited).

- 23 In the present case, as regards AICP's situation, it seems to follow from the clarifications from the Portuguese Government at the hearing before the Court that that entity, while coming within the concept of 'contracting authority' within the meaning of Article 1(9) of Directive 2004/18, constitutes a private-law association of undertakings, which does not meet the abovementioned conditions in order for the provisions of that directive to be capable of being relied on against it, because it does not provide a public-interest service under the control of the State and does not have special powers beyond those which result from the normal rules applicable in relations between individuals; it is, however, for the referring court to ascertain whether that is the case.
- 24 In such a situation, it will nonetheless be for that court to interpret domestic 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 in the second indent of Article 48(2)(a)(ii) of that directive and consequently comply with the third paragraph of Article 288 TFEU (see, to that effect, judgments of 24 January 2012 in *Dominguez*, C-282/10, EU:C:2012:33, paragraph 24 and the case-law cited, and 19 April 2016 in *DI*, C-441/14, EU:C:2016:278, paragraph 31).
- 25 In that regard, it must be noted that the obligation on a national court to refer to the content of a directive when interpreting and applying the relevant rules of domestic law is, however, limited by general principles of law and it cannot serve as the basis for an interpretation of national law *contra legem* (see, to that effect, judgments of 24 January 2012 in *Dominguez*, C-282/10, EU:C:2012:33, paragraph 25 and the case-law cited, and 19 April 2016 in *DI*, C-441/14, EU:C:2016:278, paragraph 32).
- 26 Consequently, where national law cannot be interpreted consistently with Directive 2004/18, the party adversely affected by the incompatibility of national law with EU law may rely upon the case-law deriving from the judgment of 19 November 1991 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, to that effect, judgment of 26 March 2015 in *Fenoll*, C-316/13, EU:C:2015:200, paragraph 48 and the case-law cited).
- 27 In the light of all the foregoing considerations, the answer to the first question is that the second indent of Article 48(2)(a)(ii) of Directive 2004/18 must be interpreted as meaning that, even if not transposed into domestic law, it satisfies the conditions for conferring rights on individuals that they may assert against a contracting authority before national courts, provided that that authority is a public entity or 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.

#### *The second question*

- 28 By its second question, the referring court asks essentially 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 means of a unilateral declaration, unless he proves that it is impossible or very difficult to obtain a certification from the private purchaser.

- 29 In that regard, it must be borne in mind, first of all, that Article 48(2)(a)(ii) of Directive 2004/18 provides that evidence of the economic operators' technical abilities may be furnished by a list of the principal deliveries effected or the main services provided in the three years preceding the publication of the contract notice.
- 30 Where the recipient of those deliveries or services is a private purchaser, the second indent of Article 48(2)(a)(ii) lays down that proof of those deliveries or services may be furnished by two different means, namely 'by the purchaser's certification or, failing this, simply by a declaration by the economic operator'.
- 31 The question raised by the referring court relates precisely to the relationship between those two means of evidence, in that it seeks to determine whether they are on an equal footing, so that the operator is equally at liberty to prove his technical abilities either by a private purchaser's certification or a simple declaration drafted by himself or whether, on the contrary, the EU legislature established a hierarchy between those means of evidence, so that an operator may have recourse to such a unilateral declaration only in those cases where he is unable to obtain that certification.
- 32 In that regard, it must be noted that the second indent of Article 48(2)(a)(ii) is formulated in terms which, in accordance with their usual meaning in everyday language, leave no room for any reasonable doubt.
- 33 Indeed, as the Advocate General underlined in point 43 of his Opinion, the term 'failing this' used in that provision refers, in accordance with its common meaning, to a relationship not of equivalence but rather one of subsidiarity between the means of evidence concerned.
- 34 It follows that, in accordance with a literal interpretation, the second indent of Article 48(2)(a)(ii) of Directive 2004/18 must be understood as meaning that an economic operator may be authorised by the contracting authorities to provide evidence of his technical abilities by means of a unilateral declaration only if he cannot obtain the private purchaser's certification.
- 35 Such an interpretation is indeed borne out by the context in which the terms of that article occur and the purposes of Directive 2004/18 (see, to that effect, judgment of 22 March 2012 in *GENESIS*, C-190/10, EU:C:2012:157, paragraph 41 and the case-law cited).
- 36 As regards, first, the context of the second indent of Article 48(2)(a)(ii) of Directive 2004/18, it is apparent from the case-law of the Court that that provision establishes a closed system which limits the methods of assessment and verification available of technical capacity to the contracting authorities (see, to that effect, judgment of 18 October 2012 in *Édukövízig and Hochtief Construction*, C-218/11, EU:C:2012:643, paragraph 28). It follows that although new means of evidence may not be established in the matter by those authorities, nor can those authorities limit the scope of the evidence already provided for.
- 37 The literal interpretation of the second indent of Article 48(2)(a)(ii) of Directive 2004/18, as is apparent from paragraph 34 above, is the only one consistent with that context. It is not disputed that an alternative reading of that provision, according to which the contracting authorities should allow any economic operator to choose freely between either one of the means of evidence concerned would undermine effectiveness and, therefore, the very scope of the means of evidence based on the certification from the private purchaser, since each operator would probably be content in all cases with producing a unilateral declaration in order to comply with that provision.
- 38 As regards, secondly, the aims of Directive 2004/18, it is important to note that the system established by it is intended, in particular, as apparent from recitals 2, 4 and 46 thereof, to avoid distortion of competition between private tenderers and ensure compliance with the principles of transparency, non-discrimination and equal treatment.



- 39 As it is, a literal interpretation of the second indent of Article 48(2)(a)(ii) of Directive 2004/18, as is apparent from paragraph 34 above, intended to favour the means of evidence based on a certification from the private purchaser of the economic operator concerned, also proves consistent with the pursuit of the objectives referred to in the preceding paragraph, in that, first, it guarantees more transparency and legal certainty as regards the reality of that operator's technical abilities and, secondly, it anticipates the *ex post facto* checking of the declarations provided by each economic operator which the contracting authority is required to carry out, pursuant to Article 44(1) and 45(2)(g) of Directive 2004/18.
- 40 In accordance with the principle of proportionality, which constitutes a general principle of EU law, the contracting authorities' rules related to the application of the two means of evidence referred to in the second indent of Article 48(2)(a)(ii) of Directive 2004/18 must not go beyond what is necessary to achieve the intended objectives of that directive (see, to that effect, judgment of 22 October 2015 in *Impresa Edilux and SICEF*, C-425/14, EU:C:2015:721, paragraph 29 and the case-law cited).
- 41 It follows that, as the Advocate General observed in point 50 of his Opinion and the Commission noted in its written observations, rules in a contract notice allowing an economic operator to produce a unilateral declaration in order to prove his technical abilities only if he proves that it is absolutely impossible to obtain a private purchaser's certification would prove disproportionate. Such rules would place an excessive burden on him in relation to what is necessary in order to avoid distortion of competition and ensure compliance with the principles of transparency, non-discrimination and equal treatment in the sphere of public contracts.
- 42 By contrast, rules in a contract notice according to which an economic operator is justified in relying upon such a unilateral declaration also where he proves, by means of objective evidence to be checked on a case-by-case basis, that there is a serious difficulty preventing him from obtaining such a certification, due for example to the bad faith of the private purchaser concerned, are consistent with the principle of proportionality, since they do not place an excessive burden of proof on the operator in question in relation to the pursuit of those objectives.
- 43 That appears to be the case, subject to verification by the referring court, of the rules in the contract notice drawn up by AICP which are challenged in the main proceedings.
- 44 In the light of the foregoing considerations, the answer to the second question is that the second indent of Article 48(2)(a)(ii) of Directive 2004/18 must be interpreted as meaning that it does not preclude the application of rules laid down by a contracting authority, such as those at issue in the main proceedings, which do not allow an economic operator to provide evidence of his technical abilities by a unilateral declaration, unless he proves that it is impossible or very difficult to obtain a certification from the private purchaser.

#### *The third question*

- 45 By its third question, the referring court asks essentially 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 of the tenderer's application, require that the private purchaser's certification contains authentication of the signature by a notary, lawyer or other competent entity.
- 46 In that regard, it must be noted that, in its Portuguese-language version, the expression 'purchaser's certification', in the second indent of Article 48(2)(a)(ii) of Directive 2004/18, is worded '*declaração reconhecida do adquirente*' ('certified declaration of the purchaser'), which suggests that, in order to be valid, the private purchaser's declaration must contain an authenticated signature.

- 47 However, as all the parties who have submitted written observations state, the wording of most of the other language versions of that provision is expressed differently, which seems to result in a less restrictive interpretation of the scope of such a means of evidence. It is apparent in particular from the German-language version (*'vom Erwerber ausgestellte Bescheinigung'*), Spanish-language version (*'certificado del comprador'*), Italian-language version (*'attestazione dell'acquirente'*) and English-language version (*'purchaser's certification'*) that the expression 'purchaser's certification' must be understood as meaning that an economic operator is allowed to provide evidence of his technical abilities by means of a simple document drafted without any specific formalities by one or more of his private purchasers, attesting to the principal deliveries effected or the main services provided in the past three years and stating the amounts and dates involved.
- 48 It should be noted, with regard to that linguistic divergence, that, according to settled case-law of the Court, the wording used in one language versions 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. The provisions of EU law must be interpreted and applied in a uniform manner, in the light of the versions established in all the languages of the European Union. Where there is a divergence between the various language versions of a provision of EU law, the provision in question must be interpreted by reference to the general scheme and the purpose of the rules of which it forms part (judgment of 15 October 2015 in *Grupo Itevelesa and Others*, C-168/14, EU:C:2015:685, paragraph 42 and the case-law cited).
- 49 As regards the general scheme of the second indent of Article 48(2)(a)(ii) of Directive 2004/18, as noted in paragraph 36 above, that provision establishes a closed system which limits the possibility for contracting authorities of providing for new means of evidence or formulating additional requirements introducing a substantive change to the nature or the conditions for the production of evidence already provided for.
- 50 It must be found that requiring the signature on the private purchaser's certification to be authenticated would introduce a formality amounting to such a substantive change to the first of the two means of evidence referred to in the second indent of Article 48(2)(a)(ii) of Directive 2004/18, making more burdensome the steps which must be taken by an economic operator in order to discharge his burden of proof, which would be contrary to the general scheme of that article.
- 51 As regards the purpose of Directive 2004/18, it must be borne in mind that, as is apparent from recitals 1 and 2 thereof, that directive lays down coordinating rules intended, in particular, to simplify and modernise the national procedures for the award of public contracts, in order to facilitate the freedom of movement of goods, freedom of establishment, the freedom to provide services and the opening-up of such contracts to competition.
- 52 In particular, as is apparent from the case-law of the Court, that directive seeks to facilitate the involvement of small- and medium-sized undertakings in the public contracts procurement market, as stated in recital 32 of that directive (see, to that effect, judgments of 10 October 2013 in *Swm Costruzioni 2 and Mannocchi Luigino*, C-94/12, EU:C:2013:646, paragraph 34, and 7 April 2016 in *Partner Apelski Dariusz*, C-324/14, EU:C:2016:214, paragraph 34).
- 53 However, as the Advocate General observed in points 80 and 81 of his Opinion, making the evidential value of the private purchaser's certification conditional on its signature being authenticated by a third party would introduce a formality likely not to open up public contracts to the broadest competition possible, but to restrict and limit the involvement of economic operators, in particular foreigners, in such contracts.

- 54 Because of the short time limits normally set for the submission of applications in contract notices and the divergences between the various national laws as to the authentication of the signature of documents, it cannot be excluded that many operators, above all foreigners, may be dissuaded from submitting their tenders in view of the practical difficulty of producing, in the Member State concerned by the procurement, a certification bearing a duly authenticated signature.
- 55 Consequently, the general scheme and purpose of Directive 2004/18 endorse the interpretation that the private purchaser's 'certification', like the 'certified declaration' in the Portuguese-language version of the second indent of Article 48(2)(a)(ii) of that directive, requires only that a certificate drafted by that purchaser is produced and cannot be made subject to any other formality by the contracting authorities, such as the authentication of the purchaser's signature by a competent entity.
- 56 In the light of the foregoing considerations, the answer to the third question is that the second indent of Article 48(2)(a)(ii) of Directive 2004/18 must be interpreted as meaning that it precludes the application of rules laid down by a contracting authority, such as those at issue in the main proceedings, which, on pain of exclusion of the tenderer's application, require the private purchaser's certification to contain authentication of the signature by a notary, lawyer or other competent entity.

### Costs

- 57 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fifth Chamber) hereby rules:

- 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, even if not transposed into national law, it satisfies the conditions for conferring on individuals rights that they may assert against a contracting authority before national courts, provided that that authority is a public entity or 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.**
- 2. The second indent of Article 48(2)(a)(ii) of Directive 2004/18 must be interpreted as meaning that it does not preclude the application of rules laid down by a contracting authority, such as those at issue in the main proceedings, which do not allow an economic operator to provide evidence of his technical abilities by a unilateral declaration, unless 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 must be interpreted as meaning that it precludes the application of rules laid down by a contracting authority, such as those at issue in the main proceedings, which, on pain of exclusion of the tenderer's application, require the private purchaser's certification to contain authentication of the signature by a notary, lawyer or other competent entity.**

[Signatures]