



Reports of Cases

Case C-408/16

Compania Națională de Administrare a Infrastructurii Rutiere SA

v

Ministerul Fondurilor Europene — Direcția Generală Managementul Fondurilor Externe

(Request for a preliminary ruling from the Curtea de Apel București)

(Reference for a preliminary ruling — Public procurement — Directive 2004/18/EC — Scope — Regulation (EC) No 1083/2006 — European Regional Development Fund, European Social Fund and Cohesion Fund — Finance agreement for the construction of a motorway concluded with the European Investment Bank before the accession of the Member State to the European Union — Concept of ‘irregularity’ within the meaning of Regulation No 1083/2006)

Summary — Judgment of the Court (Eighth Chamber), 6 December 2017

1. *Accession of new Member States – Romania – Public procurement – No time limit provided in the Act of Accession for the transposition of Directive 2004/18 – Consequence – Application ab initio and in toto of the directive*

(Act of Accession 2005, Arts 2 and 53(1); European Parliament and Council Directive 2004/18)

2. *Approximation of laws – Procedures for the award of public works contracts, public supply contracts and public service contracts – Directive 2004/18 – Temporal application – Decision of the contracting authority choosing the type of procedure to be followed for the award of a contract which is adopted after the accession of the Member State concerned to the Union – Applicability of the directive*

(European Parliament and Council Directive 2004/18)

3. *Approximation of laws – Procedures for the award of public works contracts, public supply contracts and public service contracts – Directive 2004/18 – Scope – Contracts awarded pursuant to the particular procedure of an international organisation – Not included – Concept of a particular procedure of an international organisation – Guide to procurement for projects financed by the European Investment Bank – Not included – National legislation favouring the application of the criteria laid down by the Guide over the less restrictive ones of Directive 2004/18 – Not permissible*

(European Parliament and Council Directive 2004/18, Art. 15(c))

4. *Own resources of the European Union – Regulation on protection of the financial interests of the Union – Eligibility for EU funding – Obligation for operations selected for funding to comply with EU law – Scope*

(Council Regulation No 1083/2006, Recital 22 and Arts 9(5) and 60(a); European Parliament and Council Directive 2004/18)

5. *Own resources of the European Union – Regulation on protection of the financial interests of the Union – Irregularity – Meaning – Recourse, in the context of public procurement relating to a project supported by the Union, to pre-selection criteria for tenders that are more restrictive than those provided for by Directive 2004/18 – Included – Application of a financial correction – Condition – Risk of impact on the budget of the Funds concerned*

(Council Regulation No 1083/2006, Art. 2, para 7, 9(5), 60(a) and 98(2); European Parliament and Council Directive 2004/18)

1. See the text of the decision.

(see paras 35-37)

2. See the text of the decision.

(see paras 39, 40)

3. 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, and in particular Article 15(c) thereof, must be interpreted as meaning that it precludes a Member State's legislation that provides, for the purposes of a public procurement procedure initiated after the date of its accession to the European Union in order to complete a project started on the basis of a finance agreement concluded with the European Investment Bank prior to that accession, the application of the specific criteria laid down by the provisions of the European Investment Bank's public procurement guide which do not comply with the provisions of that directive.

As has been stated in paragraph 41 of the present judgment, the contract notice at issue in the case in the main proceedings was published subsequent to Romania's accession to the European Union. In those circumstances, a procedure such as that at issue in the case in the main proceedings cannot be regarded as being governed by particular rules of procedure of an international organisation within the meaning of Article 15(c) of Directive 2004/18. Therefore, after the date of its accession to the European Union, Romania cannot rely on the exception relating to compliance with the particular rules of an international organisation provided for in Article 15(c) of Directive 2004/18.

(see paras 47-49, 52, operative part 1)

4. See the text of the decision.

(see paras 54-59)

5. Articles 9(5) and 60(a) of Council Regulation (EC) No 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999 must be interpreted as meaning that a public procurement procedure such as that at issue in the case in the main proceedings, in which

criteria more restrictive than those laid down in Directive 2004/18 have been applied, cannot be considered as having been conducted in complete conformity with EU law and is not eligible for non-reimbursable European funding, granted retrospectively.

Article 2(7) of Regulation No 1083/2006 must be interpreted as meaning that the use of pre-selection criteria for tenderers that are more restrictive than those provided for by Directive 2004/18 constitutes an ‘irregularity’, within the meaning of that article, justifying the application of a financial correction pursuant to Article 98 of that regulation, provided that it cannot be ruled out that such use had an impact on the budget of the Funds at issue, which it is for the national court to determine. For that purpose, Article 98(2) thereof also requires the competent national authority to calculate the amount of the correction to apply by taking into account three criteria, namely the nature and gravity of the irregularities and the resulting financial loss to the Funds (judgment of 14 July 2016, *Wrocław — Miasto na prawach powiatu*, C-406/14, EU:C:2016:562, paragraph 47). Where, as in the case at issue in the main proceedings, a specific, and not a systematic, irregularity is concerned, that requirement necessarily involves a case-by-case examination, taking into account all of the relevant circumstances in the light of one of those three criteria.

(see paras 65, 66, 68, operative part 2)