



Reports of Cases

Case C-144/17

Lloyd's of London

v

Agenzia Regionale per la Protezione dell'Ambiente della Calabria

(Request for a preliminary ruling from the Tribunale amministrativo regionale per la Calabria)

(Reference for a preliminary ruling — Public procurement — Articles 49 and 56 TFEU — Directive 2004/18/EC — Reasons for exclusion from a tendering procedure — Insurance services — Participation of several Lloyd's of London syndicates in the same tendering procedure — Signature of tenders by the Lloyd's of London General Representative for the country concerned — Principles of transparency, equal treatment and non-discrimination — Proportionality)

Summary — Judgment of the Court (Sixth Chamber), 8 February 2018

Approximation of laws — Procedures for the award of public works contracts, public supply contracts and public service contracts — Directive 2004/18 — Award of contracts — Principles of equal treatment of tenderers and transparency — Scope — National legislation allowing the contracting authority to exclude tenderers where it finds, on the basis of unambiguous evidence, that their tenders were not drawn up independently — Lawfulness

(Arts 49 TFEU and 56 TFEU; European Parliament and Council Directive 2004/18, Arts 2 and 45)

The principles of transparency, equal treatment and non-discrimination which derive from Articles 49 and 56 TFEU and are referred to in Article 2 of Directive 2004/18/EC of the 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 not precluding legislation of a Member State, such as that at issue in the main proceedings, which does not allow two syndicates of Lloyd's of London to be excluded from participation in the same procedure for the award of a public service contract for insurance merely because their respective tenders were each signed by the General Representative of Lloyd's of London for that Member State, but instead allows their exclusion if it appears, on the basis of unambiguous evidence, that their tenders were not drawn up independently.

Such an automatic exclusion constitutes an irrebuttable presumption of mutual interference in the respective tenders, for the same contract, of undertakings linked by a relationship of control or of association. Accordingly, it precludes the possibility for those candidates or tenderers of showing that their tenders are independent and is therefore contrary to the EU interest in ensuring the widest possible participation by tenderers in a call for tenders (see, to that effect, judgments of 19 May 2009, *Assitur*, C-538/07, EU:C:2009:317, paragraphs 29 and 30; of 23 December 2009, *Serrantoni and Consorzio stabile edili*, C-376/08, EU:C:2009:808, paragraphs 39 and 40; and of 22 October 2015, *Impresa Edilux and SICEF*, C-425/14, EU:C:2015:721, paragraph 36). It should be pointed out in this regard that the Court has already held that groups of undertakings can have different forms and

objectives, which do not necessarily preclude controlled undertakings from enjoying a certain autonomy in the conduct of their commercial policy and their economic activities, inter alia, in the area of their participation in the award of public contracts. Relationships between undertakings in the same group may in fact be governed by specific provisions such as to guarantee both independence and confidentiality in the drawing-up of tenders which may be submitted simultaneously by the undertakings in question in the same tendering procedure (judgment of 19 May 2009, *Assitur*, C-538/07, EU:C:2009:317, paragraph 31).

Observance of the principle of proportionality therefore requires that the contracting authority be required to examine and assess the facts, in order to determine whether the relationship between two entities has actually influenced the respective content of the tenders submitted in the same tendering procedure, a finding of such influence, in any form, being sufficient for those undertakings to be excluded from the procedure (see, to that effect, judgment of 19 May 2009, *Assitur*, C-538/07, EU:C:2009:317, paragraph 32).

(see paras 36-38, 46, operative part)