Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

11 July 2019[1]

(Reference for a preliminary ruling — Award of public supply and public works contracts — Directive 2014/24/EU — Article 28(2) — Restricted procedure — Economic operators permitted to tender — Requirement for the legal and substantive identity of the tendering candidate to correspond to that of the preselected candidate — Principle of equal treatment of tenderers)

In Case C-697/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Consiglio di Stato (Council of State, Italy), made by decision of 19 October 2017, received at the Court on 11 December 2017, in the proceedings

Telecom Italia SpA

v

Ministero dello Sviluppo Economico,

Infrastrutture e telecomunicazioni per l'Italia (Infratel Italia) SpA,

intervening party:

OpEn Fiber SpA,

THE COURT (Fifth Chamber),

composed of E. Regan, President of the Chamber, K. Lenaerts, President of the Court, acting as a Judge of the Fifth Chamber, C. Lycourgos, E. Juhász (Rapporteur) and I. Jarukaitis, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: R. Șereș, Administrator,

having regard to the written procedure and further to the hearing on 15 November 2018,

having considered the observations submitted on behalf of:

– Telecom Italia SpA, by F. Lattanzi, F. Cardarelli and F.S. Cantella, avvocati,

– Infrastrutture e telecomunicazioni per l'Italia (Infratel Italia) SpA, by F. Isgrò, P. Messina and D. Cutolo, avvocati,

1 Language of the case: Italian.

– OpEn Fiber SpA, by L. Torchia, avvocatessa,

– the Italian Government, by G. Palmieri, acting as Agent, and by G. Aiello, avvocato dello Stato,

– the European Commission, by G. Conte, P. Ondrůšek and T. Vecchi, acting as Agents,

– the EFTA Surveillance Authority, by M. Sánchez Rydelski and C. Zatschler, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 23 January 2019,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 28(2) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65).

2 The request arises out of five actions brought by Telecom Italia SpA for the annulment of decisions adopted by Infrastrutture e telecomunicazioni per l'Italia (Infratel Italia) SpA ('Infratel'), a company which the Ministero dello Sviluppo Economico (Ministry of Economic Development, Italy) has entrusted with the management of projects for the creation of a broadband and ultra-broadband network in Italy, as regards the award of public contracts for the construction, maintenance and management of public ultra-broadband networks in several regions of Italy (Abruzzo, Molise, Emilia-Romagna, Lombardy, Tuscany and Veneto).

Legal background

European Union law

Directive 2004/17/EC

3 Article 51(3) of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1) provided:

'Contracting entities shall verify that the tenders submitted by the selected tenderers comply with the rules and requirements applicable to tenders and award the contract on the basis of the criteria laid down in Articles 55 and 57.'

Directive 2014/24

4 Under Article 2(1)(12) of Directive 2014/24, a 'candidate' is defined as 'an economic operator that has sought an invitation or has been invited to take part in a restricted procedure, in a competitive procedure with negotiation, in a negotiated procedure without prior publication, in a competitive dialogue or in an innovation partnership'.

5 Article 28 of that directive, headed 'Restricted procedure', is worded as follows:

'1. In restricted procedures, any economic operator may submit a request to participate in response to a call for competition containing the information set out in Annex V parts B or C as the case may be by providing the information for qualitative selection that is requested by the contracting authority.

…

2. Only those economic operators invited to do so by the contracting authority following its assessment of the information provided may submit a tender. Contracting authorities may limit the number of suitable candidates to be invited to participate in the procedure in accordance with Article 65.

…'

Italian law

6 Decreto legislativo n. 50 — Attuazione delle direttive 2014/23/UE, 2014/24/UE e 2014/25/UE sull'aggiudicazione dei contratti di concessione, sugli appalti pubblici e sulle procedure d'appalto degli enti erogatori nei settori dell'acqua, dell'energia, dei trasporti e dei servizi postali, nonché per il riordino della disciplina vigente in materia di contratti pubblici relativi a lavori, servizi e forniture (Legislative Decree No 50 transposing Directives 2014/23/EU, 2014/24/EU and 2014/25/EU on the award of concession contracts, public procurement, and procurement by entities operating in the water, energy, transport and postal services sectors, and restructuring the legislation applicable to public works contracts, public services contracts and public supply contracts, of 18 April 2016 (Ordinary Supplement to GURI No 91 of 19 April 2016) ('the Public Procurement Code') transposed the abovementioned directives into Italian law.

7 Article 61 of the Public Procurement Code, headed 'Restricted procedure', transposed Article 28(2) of Directive 2014/24. Paragraph 3 of that article provides:

'Following the contracting authority's assessment of the information provided, only those economic operators invited to do so may submit a tender.'

The dispute in the main proceedings and the question referred for a preliminary ruling

8 In May 2016, Infratel, on behalf of the Ministry of Economic Development, initiated a restricted procedure for the award of public contracts for the construction, maintenance and management of a public passive ultra-broadband network in the so-called 'white' areas of several regions of Italy (Abruzzo, Molise, Emilia-Romagna, Lombardy, Tuscany and Veneto).

9 The award procedure was part of the implementation of the State aid scheme SA.41647 (2016/N) ('Strategia Italiana Banda Ultra-Larga'), which had been notified by the Italian authorities on 10 August 2015 and approved by a Commission decision of 30 June 2016 (C(2016) 3931 final).

10 It related to the award of five lots, and comprised the following three stages:

– submission of requests to participate (up to 18 July 2016);

– sending of invitations to preselected operators (up to 9 August 2016), and

– submission of tenders (up to 17 October 2016).

11 Requests to participate were submitted in respect of each of the five lots by Telecom Italia and, amongst others, Metroweb Sviluppo Srl and Enel OpEn Fiber SpA ('OpEn Fiber'). Although preselected, Metroweb Sviluppo did not ultimately submit a tender.

12 Infratel published the list of successful tenderers on 9 January 2017, and the provisional classification of those tenderers on 24 January 2017. OpEn Fiber was in first place in each of the five lots, with Telecom Italia second except in lot 4, where it was third.

13 Telecom Italia was not satisfied with the outcome of the award procedure and made an application for access to the documents in the file relating to that procedure.

14 It is apparent from those documents that between the preselection phase and 17 October 2016 (the deadline for submission of tenders), more specifically on 10 October 2016, a binding framework agreement was concluded between two holding companies, Enel SpA and Metroweb Italia SpA, which provided for OpEn Fiber to acquire a 100% shareholding in Metroweb SpA which controlled Metroweb Sviluppo, so as to bring about a merger by absorption of Metroweb SpA and, consequently, Metroweb Sviluppo, into OpEn Fiber. OpEn Fiber acquired Metroweb Sviluppo under a resolution of 23 January 2017, made pursuant to that framework agreement.

15 The proposed concentration had been notified to the European Commission on 10 November 2016, pursuant to Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ 2004 L 24, p. 1). By decision of 15 December 2016 (Case M.8234 — Enel/CDP Equity/Cassa Depositi e Prestiti/Enel Open Fiber/Metroweb Italia) (OJ 2017 C 15, p. 1), the Commission decided not to oppose it.

16 Telecom Italia contested the award of the five lots in five actions it brought before the Tribunale amministrativo regionale del Lazio (Regional Administrative Court of Lazio, Italy), all of which were dismissed by that court. Telecom Italia then brought an appeal against the decisions thus made by that court before the Consiglio di Stato (Council of State, Italy).

17 The Consiglio di Stato (Council of State) has raised the question of whether the requirement of legal and substantive identity established by the Court, in relation to Article 51 of Directive 2004/17, in its judgment of 24 May 2016, *MT Højgaard and Züblin* (C-396/14, EU:C:2016:347), can apply in the context of a restricted procedure under Article 28 of Directive 2014/24, such as that at issue in the main proceedings.

18 It also observes that, as at 17 October 2016 (the date for submission of tenders) the merger at issue in the main proceedings had only begun, with completion to take place at a later date; and consequently that, as at that date, there had been no change in the structure of OpEn Fiber.

19 In its view, it cannot be demonstrated that, in concluding the merger agreement in question, the parties intended to enter into an anticompetitive agreement with a view to restricting competition in relation to the procurement procedure at issue in the main proceedings.

20 In those circumstances, the Consiglio di Stato (Council of State) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Must the first sentence of Article 28(2) of Directive 2014/24/EU be interpreted as requiring pre-qualified operators and those who submit tenders in the context of a restricted procedure to be completely legally and economically identical and, in particular, must that provision be interpreted as precluding the conclusion of an agreement between the holding companies which control two pre-qualified operators at some point between pre-qualification and the submission of tenders, where: (a) that agreement has as its purpose and effect (inter alia) the completion of a merger by the absorption of one of those pre-qualified undertakings into the other (a transaction which, however, is

authorised by the European Commission); (b) the effects of that merger were fully realised after the submission of a tender by the absorbing undertaking (for which reason, at the time the tender was submitted, its composition had not changed from that which existed at the time of pre-qualification); (c) the undertaking then absorbed (whose composition had not changed at the time of the deadline for submitting tenders) has however stated that it is not taking part in the restricted procedure, probably in implementation of the contractual schedule established by the agreement drawn up between the holding companies?'

Admissibility of the request for a preliminary ruling

21 Infratel, OpEn Fiber and the Italian Government submit that the request for a preliminary ruling should be declared inadmissible, on the basis that it is not relevant for the purposes of the main proceedings, and also on the basis that it is hypothetical, or does not reflect a genuine doubt on the part of the referring court.

22 In this regard, it must be borne in mind that it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions referred concern the interpretation of EU law, the Court is in principle bound to give a ruling. The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgment of 10 July 2018, *Jehovan todistajat*, C-25/17, EU:C:2018:551, paragraph 31 and the case-law cited).

23 In the present case, it is apparent from the order for reference that the procurement procedure at issue in the main proceedings is governed by the rules set out in the contract notice, one of which refers to Article 61 of the Public Procurement Code, transposing Article 28 of Directive 2014/24. Furthermore, there is nothing in the file to indicate that the question of interpretation of EU law which is raised is unrelated to the actual facts of the main action or its purpose, or that it is hypothetical. As the referring court has pointed out, its question is intended to enable it to determine whether that provision of Directive 2014/24 requires the identity of the operator submitting a tender in a restricted procurement procedure to correspond perfectly to that of the preselected operator.

24 Furthermore, while it is true that the Consiglio di Stato (Council of State) explains why it inclines towards a particular interpretation of Article 28 of Directive 2014/24, that does not mean that it has no doubt as to the meaning of that provision. In explaining its view, the referring court is cooperating in good faith with the Court of Justice in the context of proceedings for a preliminary ruling, and responding to the invitation in paragraph 17 of the Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings (OJ 2018 C 257, p. 1), which states that 'the referring court or tribunal may also briefly state its view on the answer to be given to the questions referred for a preliminary ruling', indicating that this paragraph 17 'may be useful to the Court'.

25 In those circumstances, the request for a preliminary ruling must be held to be admissible.

On the question referred

26 By its question, the referring court asks, essentially, whether the first sentence of Article 28(2) of Directive 2014/24 must be interpreted, with regard to the requirement for the legal and substantive identity of the economic operator submitting a tender to correspond to that of the preselected operator, and in the context of a restricted procedure for the award of a public contract, as precluding a preselected candidate which has agreed to acquire another preselected candidate, under a merger agreement concluded between the preselection stage and the tendering stage, but completed after the tendering stage, from submitting a tender.

27 Under the first sentence of Article 28(2) of Directive 2014/24, only those economic operators invited to do so by the contracting authority following its assessment of the information provided may submit a tender.

28 That rule is laid down in relation to the restricted procedure, which has several stages, and particularly in relation to the preselection and tendering stages.

29 It is clear from the wording of the first sentence of Article 28(2) of Directive 2014/24 that the economic operator that submits the tender must, in principle, be the one that was preselected.

30 That provision does not lay down any rules concerning any changes which may have occurred in the structure or economic and technical capacity of the preselected candidate.

31 In its judgment of 24 May 2016, *MT Højgaard and Züblin* (C-396/14, EU:C:2016:347), the Court considered, in the analogous context of Directive 2004/17, the consequences of such changes taking place during a negotiated procedure for the award of a public contract, having regard to general principles of EU law — particularly the principle of equal treatment and the consequent obligation of transparency — and the objectives pursued by EU law in the field of public procurement.

32 In that regard, it must be recalled that the principle of equal treatment and the duty of transparency mean, in particular, that tenderers must be in a position of equality both when they formulate their tenders and when those tenders are being assessed by the contracting authority, and constitute the basis of the EU rules on procedures for the award of public contracts (judgment of 24 May 2016, *MT Højgaard and Züblin*, C-396/14, EU:C:2016:347, paragraph 37 and the case-law cited).

33 The principle of equal treatment of tenderers, the aim of which is to promote the development of healthy and effective competition between undertakings taking part in a public procurement procedure, requires that all tenderers must be afforded equality of opportunity when formulating their tenders, and therefore implies that the tenders of all competitors must be subject to the same conditions. A strict application of the principle of equal treatment of tenderers, in the context of a negotiated procedure, would lead to the conclusion that only those economic operators who have been preselected can in that capacity submit tenders and be awarded contracts (see, to that effect, judgment of 24 May 2016, *MT Højgaard and Züblin*, C-396/14, EU:C:2016:347, paragraphs 38 and 39).

34 That approach is based on Article 28(2) of Directive 2014/24, under which ‘only those economic operators invited to do so by the contracting authority following its assessment of the information provided may submit a tender’; this presupposes that the preselected economic operators and those submitting tenders are legally and substantively the same (see, by analogy, judgment of 24 May 2016, *MT Højgaard and Züblin*, C-396/14, EU:C:2016:347, paragraph 40).

35 However, the Court has also held that, in a negotiated procedure, where a group of undertakings preselected as such, incorporating two economic operators, had been dissolved, one of those operators could take the place of the group and continue the procedure in its own name, provided that it was

established that that economic operator by itself met the requirements initially laid down by the contracting entity, and that the continuation of its participation in that procedure did not mean that other tenderers were placed at a competitive disadvantage (see, to that effect, judgment of 24 May 2016, *MT Højgaard and Züblin*, C-396/14, EU:C:2016:347, paragraph 48 and operative part).

36 It should be noted that the case which gave rise to that judgment involved a change in both the legal and the substantive identity of the tendering operator, as compared to the preselected operator, given that the procedure was not taken forward by the group of undertakings which had been preselected as such, but by one of the operators which had formed that group, and that the economic and technical capacity of the original candidate had been reduced through the loss of the capacity of one of the economic operators in question. However, that change did not mean that the procedure could not be followed through, provided that the conditions identified by the Court were satisfied.

37 In that regard, it should be emphasised that the main proceedings relate, by contrast, to a situation in which one of the tenderers has increased its capacity, through the acquisition of one of the other preselected tenderers.

38 It is therefore necessary to determine whether, in those circumstances, there has been a change in the legal and substantive identity of the preselected tenderers.

39 It is common ground in this matter that, as regards OpEn Fiber, the requirement for the legal identity of the tendering candidate to correspond to that of the preselected candidate has been met.

40 On the other hand, it is apparent from the request for a preliminary ruling that, between the preselection stage and the deadline for submission of tenders, the holding companies of two tenderers, OpEn Fiber and Metroweb Sviluppo, entered into a binding framework agreement on terms leading to a merger by absorption of Metroweb Sviluppo into OpEn Fiber. In so far as a firm commitment had been made, under which OpEn Fiber was obliged to acquire the assets of Metroweb Sviluppo, and in so far as OpEn Fiber could, therefore — despite the need to wait for a decision of the Commission — reasonably count on the capacity of Metroweb Sviluppo being available in relation to its future activity, it must be held that, even though the concrete and definitive effects of the merger at issue did not materialise until after submission of tenders, the substantive identity of OpEn Fiber was not the same, on the deadline for submission of tenders, as it had been on the date of preselection.

41 Consequently, it is necessary to determine whether, notwithstanding that change in substantive identity, the principle of equal treatment can be held not to have been infringed, in the light of the criteria referred to in the judgment of 24 May 2016, *MT Højgaard and Züblin* (C-396/14, EU:C:2016:347, paragraph 48), cited in paragraph 36 of the present judgment.

42 In that regard, it is important to point out, as is apparent from paragraph 37 of this judgment, that those criteria were developed in the context of the case that gave rise to the judgment of 24 May 2016, *MT Højgaard and Züblin* (C-396/14, EU:C:2016:347), where, essentially, the circumstances were such that the capacity of the initially preselected tenderer had decreased, whereas the present case concerns a situation in which one of the tenderers has increased its capacity through the acquisition of one of the other preselected tenderers. That difference of circumstances inevitably has consequences as regards the application of the criteria to the facts of the present case, bearing in mind that, unlike an increase in the capacity of a tenderer, a reduction in capacity is liable to give rise to difficulties in the context of a procedure for the award of a public contract.

43 To allow a tender to be submitted by a candidate whose economic and technical capacity is appreciably less than it was at the time of preselection is, potentially, to circumvent the preselection procedure, given that a candidate whose capacity had been thus reduced might not have been preselected.

44 In a negotiated procedure for the award of a public contract, it is in the interests of the contracting authority that, where the candidates have been preselected, their economic and technical capacity is maintained throughout the procedure, as the loss of such capacity would create a risk of undermining the objective of the procedure, which is to select a tenderer capable of performing the contract in question.

45 By contrast, it is not contrary to the interests of the contracting authority for a candidate to increase its economic and technical capacity after preselection. It may even be regarded as normal for a candidate to acquire the resources necessary to satisfy itself that it can guarantee the proper performance of the contract.

46 Such an increase in economic and technical capacity may take the form, amongst other things, of the candidate availing itself of the resources of other economic operators, or indeed of partial or total absorption of another economic operator, including one participating in the same negotiated procedure for the award of a public contract.

47 In the light of those considerations, it must be held that the proviso which, essentially, requires an economic operator wishing to continue a procedure for the award of a public contract as a tenderer to establish, where its legal or substantive identity has changed between the preselection stage and the deadline for submission of tenders, that it still meets the requirements initially laid down by the contracting authority, is satisfied by hypothesis in circumstances where its substantive capacity has only increased.

48 As to the proviso that the continuing participation of the tenderer in a procedure for the award of a public contract must not place other tenderers at a competitive disadvantage, and whether that proviso is satisfied on the facts of the present case, it must be noted that there are other provisions of EU law, distinct from those governing public contracts, which are specifically intended to ensure that mergers such as that at issue in the main proceedings do not pose a threat to free and undistorted competition within the internal market. Thus, in so far as the conduct of an economic operator complies with those specific rules, its participation in such a merger cannot be regarded as being liable, in itself, to place other tenderers at a competitive disadvantage, simply on the basis that the merged entity will benefit from greater economic and technical capacity.

49 Accordingly, an acquisition such as that at issue in the main proceedings must be effected in accordance with EU legislation, and particularly Regulation No 139/2004.

50 In the present case, it is apparent from the request for a preliminary ruling that the Commission decided, on 15 December 2016, pursuant to that regulation, not to oppose the notified concentration.

51 It should be added that, although the principle of equal treatment is not undermined by the mere fact of a merger between two preselected tenderers, the possibility cannot be ruled out that sensitive information relating to the procurement procedure may have been exchanged by the parties to the merger, prior to its completion. Such a situation could give the acquiring operator unjustified advantages, at the tendering stage, in relation to the other tenderers, which would inevitably place those other tenderers at a competitive disadvantage (see, by analogy, judgment of 17 May 2018 *Specializuotas transportas*, C-531/16, EU:C:2018:324, paragraph 29).

52 In principle, such circumstances would be sufficient to prevent the acquiring operator's tender being considered by the contracting authority (see, by analogy, judgment of 17 May 2018, *Specializuotas transportas*, C-531/16, EU:C:2018:324, paragraph 31).

53 However, it is not to be presumed that such exchanges of information — which, as the Commission pointed out in its observations, might infringe Article 7 of Regulation No 139/2004, under which concentrations falling within the scope of that regulation may not be implemented until they have been authorised, as well as Article 101 TFEU — have in fact taken place. In the present case, it is apparent from the information available to the Court that no collusive conduct has been established.

54 It follows from all the foregoing considerations that the first sentence of Article 28(2) of Directive 2014/24 must be interpreted, with regard to the requirement for the legal and substantive identity of the economic operator submitting a tender to correspond to that of the preselected operator, and in the context of a restricted procedure for the award of a public contract, as not preventing a preselected candidate which has agreed to acquire another preselected candidate, under a merger agreement concluded between the preselection stage and the tendering stage, but completed after the tendering stage, from submitting a tender.

Costs

55 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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:

The first sentence of Article 28(2) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC must be must be interpreted, with regard to the requirement for the legal and substantive identity of the economic operator submitting a tender to correspond to that of the preselected operator, and in the context of a restricted procedure for the award of a public contract, as not preventing a preselected candidate which has agreed to acquire another preselected candidate, under a merger agreement concluded between the preselection stage and the tendering stage, but completed after the tendering stage, from submitting a tender.

[Signatures]