



Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

8 June 2023*

(Reference for a preliminary ruling – European Union Structural Funds – Regulation (EC) No 1083/2006 – Article 2(7) – Concept of ‘irregularity’ – Article 98(1) and (2) – Financial corrections by Member States in connection with irregularities detected – Criteria to be applied – Directive 2004/18/EC – Point (d) of the first subparagraph of Article 45(2) – Concept of ‘grave professional misconduct’)

In Case C-545/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio, Italy), made by decision of 4 August 2021, received at the Court on 31 August 2021, in the proceedings

Azienda Nazionale Autonoma Strade SpA (ANAS)

v

Ministero delle Infrastrutture e dei Trasporti,

THE COURT (Third Chamber),

composed of K. Jürimäe, President of the Chamber, M. Safjan, N. Piçarra (Rapporteur), N. Jääskinen and M. Gavalec, Judges,

Advocate General: A. Rantos,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Azienda Nazionale Autonoma Strade SpA (ANAS), by R. Bifulco, P. Pittori and E. Scotti, avvocati,
- the Italian Government, by G. Palmieri, acting as Agent, and by D. Di Giorgio, avvocato dello Stato,
- the European Commission, by F. Moro, P. Rossi and G. Wils, acting as Agents,

* Language of the case: Italian.

after hearing the Opinion of the Advocate General at the sitting on 15 December 2022,
gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 1 of the Convention drawn up on the basis of Article K.3 of the Treaty on European Union on the protection of the European Communities' financial interests, signed in Brussels on 26 July 1995 and annexed to the Council Act of 26 July 1995 (OJ 1995 C 316, p. 49; 'the PFI Convention'), Article 1(2) of Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests (OJ 1995 L 312, p. 1), Article 70(1)(b) 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 (OJ 2006 L 210, p. 25), Article 27(c) of Commission Regulation (EC) No 1828/2006 of 8 December 2006 setting out rules for the implementation of Regulation No 1083/2006 and of Regulation (EC) No 1080/2006 of the European Parliament and of the Council on the European Regional Development Fund (OJ 2006 L 371, p. 1), Article 3(2)(b) of Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law (OJ 2017 L 198, p. 29) and point (d) of the first subparagraph of Article 45(2) 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 was made in the context of a dispute between Azienda Nazionale Autonoma Autostrade SpA (ANAS) and the Ministero delle Infrastrutture e dei Trasporti (Ministry of Infrastructure and Transport, Italy) concerning the lawfulness of the latter's decision determining the recovery of the sums paid to ANAS under an operational programme including a contract for the performance of road works, co-financed by the European Regional Development Fund (ERDF), approved by Commission Decision C(2007) 6318 of 7 December 2007, finally amended by Commission Decision C(2016) 6409 of 13 October 2016.

European Union law

Regulation No 2988/95

- 3 Article 1(2) of Regulation No 2988/95 provides:

“Irregularity” shall mean any infringement of a provision of Community law resulting from an act or omission by an economic operator, which has, or would have, the effect of prejudicing the general budget of the [European] Communities or budgets managed by them, either by reducing or losing revenue accruing from own resources collected directly on behalf of the Communities, or by an unjustified item of expenditure.’

- 4 Article 4 of that regulation is worded as follows:
- ‘1. As a general rule, any irregularity shall involve withdrawal of the wrongly obtained advantage:
- by an obligation to pay or repay the amounts due or wrongly received,
- ...
2. Application of the measures referred to in paragraph 1 shall be limited to the withdrawal of the advantage obtained plus, where so provided for, interest which may be determined on a flat-rate basis.
3. Acts which are established to have as their purpose the obtaining of an advantage contrary to the objectives of the Community law applicable in the case by artificially creating the conditions required for obtaining that advantage shall result, as the case shall be, either in failure to obtain the advantage or in its withdrawal.
4. The measures provided for in this Article shall not be regarded as penalties.’
- 5 Article 5 of that regulation lists the administrative penalties which may be imposed in the event of intentional irregularities or those caused by negligence.

Regulation No 1083/2006

- 6 Regulation No 1083/2006 was repealed with effect from 1 January 2014 by Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Regulation No 1083/2006 (OJ 2013 L 347, p. 320). However, given the date of the facts at issue, the dispute in the main proceedings is governed by Regulation No 1083/2006. Article 2(4) and (7) of that regulation provided:
- ‘For the purposes of this Regulation, the following terms have the meanings assigned to them here:
- ...
- (4) “beneficiary”: an operator, body or firm, whether public or private, responsible for initiating or initiating and implementing operations. ...
- ...
- (7) “irregularity”: any infringement of a provision of Community law resulting from an act or omission by an economic operator which has, or would have, the effect of prejudicing the general budget of the European Union by charging an unjustified item of expenditure to the general budget.’

7 Article 60(a) of that regulation designates the managing authority for ‘ensuring that operations are selected for funding in accordance with the criteria applicable to the operational programme and that they comply with applicable Community and national rules for the whole of their implementation period’.

8 Article 98 of that regulation, entitled ‘Financial corrections by Member States’, provides:

‘1. The Member States shall in the first instance bear the responsibility for investigating irregularities, acting upon evidence of any major change affecting the nature or the conditions for the implementation or control of operations or operational programmes and making the financial corrections required.

2. The Member State shall make the financial corrections required in connection with the individual or systemic irregularities detected in operations or operational programmes. The corrections made by a Member State shall consist of cancelling all or part of the public contribution to the operational programme. The Member State shall take into account the nature and gravity of the irregularities and the financial loss to the Funds.

...’

Regulation No 1828/2006

9 Article 27(a) of Regulation No 1828/2006 defines an ‘economic operator’ as ‘any natural or legal person or other entity taking part in the implementation of assistance from the Funds, with the exception of a Member State exercising its prerogatives as a public authority’. Article 27(c) defines ‘suspected fraud’ as ‘an irregularity giving rise to the initiation of administrative or judicial proceedings at national level in order to establish the presence of intentional behaviour, in particular fraud, as referred to in Article 1(1)(a) of the [PFI Convention].’

Directive 2004/18

10 Article 2 of Directive 2004/18, entitled ‘Principles of awarding contracts’, provides:

‘Contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way.’

11 Point (d) of the first subparagraph of Article 45(2) of that directive is worded as follows:

‘Any economic operator may be excluded from participation in a contract where that economic operator:

...

(d) has been guilty of grave professional misconduct proven by any means which the contracting authorities can demonstrate’.

The 2013 Guidelines

12 Article 2 of Commission Decision C(2013) 9527 final of 19 December 2013 on the setting out and approval of the guidelines for determining financial corrections to be made by the Commission to expenditure financed by the Union under shared management, for non-compliance with the rules on public procurement ('the 2013 Guidelines') provides that 'the guidelines set out in the Annex shall be applied by the Commission when making financial corrections related to irregularities detected after the date of adoption of this Decision'.

13 Point 1.3 of the annex to the 2013 Guidelines states:

'These guidelines set out a range of corrections of 5%, 10%, 25% and 100% that are applied to the expenditure of a contract. They take into account the seriousness of the irregularity and the principle of proportionality. These rates of corrections are applied when it is not possible to quantify precisely the financial implications for the contract in question.

The seriousness of an irregularity related to non-compliance with the rules on public procurement and the related financial impact to the Union budget is assessed taking into account the following factors: level of competition, transparency and equal treatment. When the non-compliance at stake has a deterrent effect to potential tenderers or when the non-compliance leads to the award of a contract to a tender other than the one that should have been awarded, this is a strong indicator that the irregularity is serious.

...

A financial correction of 100% may be applied in the most serious cases when the irregularity favours certain tenderer(s)/ candidate(s) or where the irregularity relates to fraud, as established by a competent judicial or administrative body.'

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

14 By Decision C(2007) 6318 of 7 December 2007, the European Commission approved the national operational programme 'Networks and Mobility' 2007-2013. ANAS, as beneficiary of that programme, within the meaning of Article 2(4) of Regulation No 1083/2006, was granted funding to carry out, inter alia, a road modernising project.

15 To that end, ANAS, in its capacity as contracting authority, launched a restricted tendering procedure, announcing that the public works contract would be awarded on the basis of the economically most advantageous criterion. At the end of that procedure, by decision of 8 August 2012, that contract was awarded to a temporary group of undertakings, including Aleandri SpA. The works were completed and the road opened to traffic.

16 The Ministry of Infrastructure and Transport, having become aware of a criminal investigation bringing to light a potential system of corruption involving ANAS officials, ordered, by decision of 10 June 2020, the recovery of the sums previously paid to ANAS under that programme. It also declared that the balance not yet paid was not payable, on the ground that the award of the contract in question had to be regarded as vitiated by an irregularity of a fraudulent nature for the purposes of Article 2(7) of Regulation No 1083/2006 and Articles 4 and 5 of Regulation No 2988/95.

- 17 That decision is based, *inter alia*, on the bringing of charges against three ANAS officials, two of whom were among the five members of the tender evaluation committee. They are accused of having accepted sums of money from Aleandri, in exchange for acts of favouritism during the tendering procedure. Criminal proceedings for acts of corruption are still pending against Aleandri's legal representative and the company itself.
- 18 ANAS brought an action for annulment of that decision before the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio, Italy), which is the referring court. It states that it has not been the subject of any conviction and that no wrongful conduct on the part of the members of the tender evaluation committee can be relied on against it. In addition, as the work funded by the general budget of the European Union was actually and correctly carried out, there is no connection between the alleged irregularity or fraud and the expenditure incurred. Nor has it been proved that Aleandri unlawfully obtained the public contract in question.
- 19 The referring court points out that the only irregularity committed during the tendering procedure at issue in the main proceedings, evidence of which is partly established, lies in the conduct of Aleandri's legal representative, which sought to influence the outcome of that procedure and is a crime of active corruption. That court states, however, that the criminal proceedings against that representative are still ongoing. As regards ANAS, the referring court notes that its manager asked two officials sitting on the tender evaluation committee, one of whom was president, to favour Aleandri. However, the criminal proceedings have not made it possible to establish whether those officials had actually favoured that tenderer or whether, in the absence of such intervention, the contract would have been awarded to one of Aleandri's competitors.
- 20 The referring court thus considers that, despite suspicions, it is not in a position to hold, even incidentally, that the contract was awarded unlawfully to Aleandri, on account of the conduct of that company's representative and that it cannot be concluded from the conduct of the tendering procedure that Aleandri's technical project did not deserve the score obtained or that the tender evaluation committee applied criteria other than those referred to in the contract notice. That court states that the call for tenders launched in 2012 was governed by Legislative Decree No 163/2006, Article 38(1)(c) and (f) of which did not contain any exclusion clause with regard to an economic operator which had attempted to influence the outcome of such a procedure.
- 21 In those circumstances the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
- '(1) Must Article 70(1)(b) of [Regulation No 1083/2006], Article 27(c) of [Regulation No 1828/2006], Article 1 of the [PFI Convention], Article 1(2) of [Regulation No 2988/95] and Article (3)(2)(b) of [Directive 2017/1371] be interpreted as meaning that conduct which is likely, in the abstract, to favour an economic operator during a contract award procedure is always categorised as an "irregularity" or as "fraud", thus constituting a legal basis for the recovery of the aid, even when there is no complete proof that such conduct has actually taken place, or there is no complete proof that it was decisive in the selection of the beneficiary?

- (2) Does Article 45(2)(d) of [Directive 2004/18] preclude a legal provision such as Article 38(1)(f) of Legislative Decree No 163/2006, which does not allow the exclusion from a tender of an economic operator [which] has attempted to influence the decision-making process of the contracting authority, particularly when the attempt consisted of bribing certain members of the tender evaluation committee?
- (3) If the answer to one or both of the above questions is in the affirmative, must the rules referred to always be interpreted as requiring the Member State to recover the aid and the Commission to make a 100% financial correction, despite the fact that the aid was used for its intended purpose, for a project eligible for EU funding and which was actually implemented?
- (4) If the answer to question 3 is negative, [that is to say,] that no recovery of the aid or 100% financial correction is necessary, do the provisions referred to in question 1, and compliance with the principle of proportionality, make it possible to establish the recovery of the aid and the financial correction taking into account the financial damage actually caused to the general budget of the European Union? More specifically, in a situation such as the one at issue in these proceedings, can the “financial implications”, within the meaning of Article [99](3) of [Regulation No 1083/2006], be established on a flat-rate basis, by applying the criteria set out in the table under [Title 2] of [the annex to the 2013 Guidelines]?’

Consideration of the questions referred

The first question

- 22 As a preliminary point, it is important to recall that, in order to provide a useful answer to the referring court, the Court of Justice may deem it necessary to interpret provisions of EU law to which the national court has not referred in its questions, in particular by extracting from the statement of grounds in the order for reference the elements of EU law which, having regard to the subject matter of the dispute, require interpretation (see, to that effect, judgments of 12 December 1990, *SARPP*, C-241/89, EU:C:1990:459, paragraph 8; of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania*, C-74/16, EU:C:2017:496, paragraph 36; and of 2 March 2023, *Åklagarmyndigheten*, C-666/21, EU:C:2023:149, paragraph 22).
- 23 Secondly, it is important to note that there is nothing in the request for a preliminary ruling to suggest that the existence of fraud may be taken as established. Since criminal proceedings are still pending in order to assess whether the facts at issue in the main proceedings may be classified as ‘acts of corruption’, they can constitute, at this stage, only ‘suspected fraud’ within the meaning of Article 27(c) of Regulation No 1828/2006, namely an irregularity which gave rise to the initiation of administrative or judicial proceedings at national level in order to establish the existence of intentional behaviour.
- 24 Thirdly, in so far as the referring court must assess the lawfulness of the decision to recover the sums paid to ANAS, as a ‘beneficiary’, within the meaning of Article 2(4) of Regulation No 1083/2006, of the programme co-financed by the ERDF, it is necessary to interpret Article 2(7) of that regulation, concerning the concept of ‘irregularity’ on which that decision is *inter alia* based.

- 25 Such a concept, as the Advocate General observed in point 18 of his Opinion, encompasses the more restricted concept of ‘suspected fraud’ referred to in Article 27(1)(c) of Regulation No 1828/2006.
- 26 Consequently, it must be considered that, by its first question, the referring court asks, in essence, whether the concept of ‘irregularity’, within the meaning of Article 2(7) of Regulation No 1083/2006, must be interpreted as covering behaviour liable to be classified as ‘acts of corruption’ carried out in the context of a procedure for the award of a public contract for the performance of works co-financed by an EU structural fund for which administrative or judicial proceedings have been initiated, including where it has not been established that that behaviour had a real impact on the procedure for selecting the tenderer and where no actual adverse effect on the budget of the European Union has been found.
- 27 The concept of ‘irregularity’ is defined in Article 2(7) of Regulation No 1083/2006, and, in similar terms, inter alia in Article 1(2) of Regulation No 2988/95, as any infringement of a provision of EU law resulting from an act or omission by an economic operator which has, or would have, the effect of prejudicing the general budget of the European Union by charging an unjustified item of expenditure to the general budget.
- 28 Since that concept forms part of a system intended to ensure the proper management of EU funds and the safeguarding of the European Union’s financial interests, it must be interpreted uniformly and broadly in accordance with the objective pursued by Regulation No 1083/2006, which is to ensure that funds are properly and efficiently used in order to protect the financial interests of the European Union (see, to that effect, judgment of 1 October 2020, *Elme Messer Metalurgs*, C-743/18, EU:C:2020:767, paragraphs 59 and 63 and the case-law cited).
- 29 The existence of an ‘irregularity’ within the meaning of Article 2(7) of Regulation No 1083/2006 presupposes the combination of three elements, namely an infringement of EU law, an act or omission by an economic operator which caused that infringement and actual or potential prejudice to the budget of the European Union (see, to that effect, judgment of 1 October 2020, *Elme Messer Metalurgs*, C-743/18, EU:C:2020:767, paragraph 51).
- 30 The first condition covers not only breaches of a provision of EU law as such, but also breaches of the provisions of national law which are applicable to operations supported by the Structural Funds of the European Union and thus contribute to ensuring the correct application of EU law relating to the management of projects financed by those funds. Thus, under Article 60(a) of Regulation No 1083/2006, it is the responsibility of the managing authority to ensure that operations selected for funding comply with applicable EU and national rules for the whole of their implementation period (see, to that effect, judgment of 1 October 2020, *Elme Messer Metalurgs*, C-743/18, EU:C:2020:767, paragraphs 52 and 53 and the case-law cited).
- 31 The role of the European Union is therefore to finance, through its funds, only actions conducted in complete conformity, inter alia, with the principles and rules on the award of public contracts (see, to that effect, judgments of 14 July 2016, *Wrocław – Miasto na prawach powiatu*, C-406/14, EU:C:2016:562, paragraph 43, and of 6 December 2017, *Compania Națională de Administrare a Infrastructurii Rutiere*, C-408/16, EU:C:2017:940, paragraph 57), in particular the principle of equal treatment of tenderers and the principle of transparency, guaranteed in Article 2 of Directive 2004/18.

- 32 The principle of equal treatment of tenderers requires economic operators interested in a public contract to be afforded equality of opportunity when formulating their tenders, to be made aware of the exact constraints of the procedure and to be in fact assured that all tenderers are subject to the same conditions (judgment of 14 December 2016, *Connexxion Taxi Services*, C-171/15, EU:C:2016:948, paragraph 39 and the case-law cited). Furthermore, 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 (see, to that effect, judgment of 16 December 2008, *Michaniki*, C-213/07, EU:C:2008:731, paragraph 45 and the case-law cited).
- 33 The principle of transparency is essentially intended to preclude any risk of favouritism or arbitrariness on the part of the contracting authority (see, to that effect, judgment of 3 October 2019, *Irgita*, C-285/18, EU:C:2019:829, paragraph 55).
- 34 Subject to the verifications which it is for the referring court to carry out, it is apparent from the information available to the Court that, in the case in the main proceedings, in view of the accusations of acts of corruption intended to influence the decision-making process for the award of the public contract at issue, it cannot be ruled out that certain members of ANAS's tender evaluation committee favoured one of the tenderers and discriminated against its competitors, thus infringing the principles of transparency and equal treatment of tenderers, guaranteed in Article 2 of Directive 2004/18.
- 35 As regards the second condition necessary for the characterisation of an 'irregularity' within the meaning of Article 2(7) of Regulation No 1083/2006, namely that such an irregularity arises from an act or omission by an economic operator, Article 27(a) of Regulation No 1828/2006 laying down detailed rules for the implementation of Regulation No 1083/2006 defines an 'economic operator' as any natural or legal person and other entities taking part in the implementation of assistance from the funds, with the exception of Member States exercising their prerogatives as a public authority.
- 36 In the light of that definition, there can be little doubt that ANAS, in its capacity as a 'beneficiary', within the meaning of Article 2(4) of Regulation No 1083/2006, of the fund concerned, which organised, as contracting authority, the procedure for the award of the public contract at issue in the main proceedings, constitutes an economic operator.
- 37 In that regard, it should be noted that, in order for an act or omission constituting an infringement of the applicable EU or national law to be regarded as an 'irregularity' within the meaning of Article 2(7) of Regulation No 1083/2006, no intentional or negligent conduct on the part of the economic operator involved needs to be demonstrated (see, to that effect, judgment of 1 October 2020, *Elme Messer Metalurgs*, C-743/18, EU:C:2020:767, paragraph 65).
- 38 As regards the third condition necessary for the characterisation of an 'irregularity', within the meaning of Article 2(7) of that regulation, namely that the infringement of EU or national law by an economic operator has, or would have, the effect of prejudicing the general budget of the European Union, it must be pointed out, as is apparent in particular from the words 'would have the effect of', that that condition does not require the existence of a specific financial impact on the EU budget to be demonstrated. A failure to comply with the public procurement rules constitutes an irregularity, within the meaning of that provision, in so far as the possibility cannot be excluded that that failure will have an impact on the budget of the fund concerned (see, to that effect, judgment of 6 December 2017, *Compania Națională de Administrare a Infrastructurii Rutiere*, C-408/16, EU:C:2017:940, paragraphs 60 and 61 and the case-law cited).

- 39 Thus, it must be held that behaviour capable of being classified as ‘acts of corruption carried out in the context of a procedure for the award of a public contract’ is liable, by its very nature, to influence the award of that contract. Consequently, it cannot be ruled out that such behaviour may have an impact on the budget of the fund in question.
- 40 In the light of the foregoing, the answer to the first question is that Article 2(7) of Regulation No 1083/2006 must be interpreted as meaning that the concept of ‘irregularity’, within the meaning of that provision, covers behaviour liable to be classified as ‘acts of corruption’ carried out in the context of a procedure for the award of a public contract for the performance of works co-financed by an EU structural fund, and for which an administrative or judicial procedure has been initiated, including where it is not proved that that behaviour had a real impact on the procedure for selecting the tenderer and where no actual adverse effect on the budget of the European Union has been found.

The third and fourth questions

- 41 By its third and fourth questions, which it is appropriate to examine together and in the second place, the referring court asks, in essence, whether Article 98(1) and (2) of Regulation No 1083/2006 must be interpreted as meaning that, in the event of an irregularity, as defined in Article 2(7) of that regulation, the Member States are required automatically to apply a financial correction of 100% or whether they are required, in order to determine the financial correction applicable, to carry out an assessment on a case-by-case basis, having regard in particular to the principle of proportionality.
- 42 Pursuant to Article 98(1) of Regulation No 1083/2006, which deals specifically with financial corrections by Member States, the Member States in the first instance are to bear responsibility for investigating irregularities, acting upon evidence of any major change affecting the nature or the conditions for the implementation or control of operations or operational programmes and making the financial corrections required. Paragraph 2 of that article states, first, that the Member States are to make the financial corrections required in connection with the individual or systemic irregularities detected in operations or operational programmes and, secondly, those corrections are to consist of cancelling all or part of the public contribution to the operational programme, taking into account the nature and gravity of the irregularities and the financial loss to the fund.
- 43 Those criteria are an expression of the principle of proportionality which is one of the general principles of EU law (judgments of 18 November 1987, *Maizena and Others*, 137/85, EU:C:1987:493, paragraph 15; of 10 July 2003, *Commission v ECB*, C-11/00, EU:C:2003:395, paragraph 156; and of 11 January 2017, *Spain v Council*, C-128/15, EU:C:2017:3, paragraph 71).
- 44 It follows that an interpretation of Article 98(1) and (2) of Regulation No 1083/2006 to the effect that it systematically requires Member States, where an irregularity, within the meaning of Article 2(7) of that regulation, is found, to withdraw the approved financing in its entirety and to recover the amounts already paid, including where that financing has been used for the purposes provided for and for works eligible for European financing and actually carried out, apart from finding no support in the wording of those provisions, would amount, moreover, to automatically introducing a financial correction rate of 100%, in breach of the criteria laid down in Article 98(2) and the principle of proportionality.

- 45 In that context, the 2013 Guidelines, mentioned by the referring court, which define the scale of the financial correction rates applicable under, *inter alia*, Article 99 of Regulation No 1083/2006, which relates to the criteria applicable to financial corrections made by the Commission, may be taken into consideration in order to give concrete expression to the criteria set out in Article 98(2) of that regulation, in other words, the criteria applicable to financial corrections made by the Member States. Although those guidelines do not bind the Member States, they are nevertheless recommended, in point 1.1 thereof, ‘to apply the same criteria and rates when correcting [*inter alia*, under Article 98 of that regulation,] irregularities detected by their own services’.
- 46 It is apparent from the first paragraph of point 1.3 of those guidelines, relating to the ‘criteria to consider when deciding which rate of correction to apply’, that, when it is not possible to quantify precisely the financial impact for the contract in question, the application of a correction rate of 5%, 10%, 25% or 100% must take into account the seriousness of the irregularity and the principle of proportionality.
- 47 In accordance with the second subparagraph of point 1.3, an irregularity is considered to be serious where the non-compliance with the rules on public procurement, in particular the principles of transparency and equal treatment, leads to the award of a contract to a tenderer other than the one that should have been awarded the contract. Furthermore, it is apparent in particular from the last subparagraph of point 1.3 that, when the irregularity favours a certain tenderer or tenderers, a financial correction of 100% may be applied.
- 48 In the present case, the referring court finds that the irregularity found in the procedure for the award of the public contract at issue gave rise to the initiation of administrative and judicial proceedings at national level, in order to determine whether there was fraudulent behaviour constituting a crime of corruption. Subject to the assessments to be made in that regard by the referring court, under Article 27(1)(c) of Regulation No 1828/2006, such an irregularity is capable of falling within the concept of ‘suspected fraud’ and thus of being classified as ‘serious’, in accordance with the second subparagraph of point 1.3 of the 2013 Guidelines.
- 49 In the light of the foregoing, the answer to the third and fourth questions is that Article 98(1) and (2) of Regulation No 1083/2006 must be interpreted as meaning that, in the event of an ‘irregularity’, as defined in Article 2(7) of that regulation, the Member States, in order to determine the applicable financial correction, must carry out an assessment on a case-by-case basis, in accordance with the principle of proportionality, taking into account, *inter alia*, the nature and seriousness of the irregularities found and their financial impact on the fund concerned.

The second question

- 50 By its second question, which must be examined in the last place, the referring court asks, in essence, whether point (d) of the first subparagraph of Article 45(2) of Directive 2004/18 must be interpreted as precluding a national law which does not allow the exclusion from a public procurement procedure of an economic operator which has attempted to influence the outcome of that procedure, in particular, by means of acts of active corruption with regard to members of the tender evaluation committee.
- 51 Point (d) of the first subparagraph of Article 45(2) of Directive 2004/18 permits the exclusion from an award procedure of any economic operator which has been guilty of grave professional misconduct proven by any means which the contracting authorities can demonstrate.

- 52 Nevertheless, the concept of ‘grave professional misconduct’ must be understood as normally referring to conduct by the economic operator at issue which denotes a wrongful intent or negligence of a certain gravity on its part. Such fault may be established without a judgment having the force of *res judicata* being required (judgment of 13 December 2012, *Forposta and ABC Direct Contact*, C-465/11, EU:C:2012:801, paragraphs 27, 28 and 30).
- 53 However, in order for that misconduct to entail the exclusion of the economic operator which committed it from the procedure for the award of a public contract, it must necessarily be established before the end of that procedure (see, by analogy, judgment of 20 December 2017, *Impresa di Costruzioni Ing. E. Mantovani and Guerrato*, C-178/16, EU:C:2017:1000, paragraph 38).
- 54 In the present case, it is apparent from the request for a preliminary ruling that ANAS was alerted to the potential existence of a system of corruption involving some of its officials only when criminal investigations into the procedure for the award of that public contract were opened several years after the public contract at issue in the main proceedings had been awarded. Since it was thus unaware that Aleandri’s legal representative had been able to commit acts of corruption with regard to some of its officials, ANAS was not in a position to allege grave professional misconduct in respect of that behaviour and, therefore, to exclude from the procedure at issue the temporary group of undertakings to which that undertaking belonged.
- 55 In those circumstances, there is no need to examine whether point (d) of the first subparagraph of Article 45(2) of Directive 2004/18 must be interpreted as precluding national legislation which does not allow the exclusion from a public procurement procedure of an economic operator which has attempted to influence the outcome of that procedure, in particular, by acts of active corruption with regard to members of the tender evaluation committee.

Costs

- 56 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 (Third Chamber) hereby rules:

1. Article 2(7) 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 the concept of ‘irregularity’, within the meaning of that provision, covers behaviour liable to be classified as ‘acts of corruption’ carried out in the context of a procedure for the award of a public contract for the performance of works co-financed by an EU structural fund, and for which an administrative or judicial procedure has been initiated, including where it is not proved that that behaviour had a real impact on the procedure for selecting the tenderer and where no actual adverse effect on the budget of the European Union has been found.

2. Article 98(1) and (2) of Regulation No 1083/2006

must be interpreted as meaning that in the event of an ‘irregularity’, as defined in Article 2(7) of that regulation, the Member States, in order to determine the applicable financial correction, must carry out an assessment on a case-by-case basis, in accordance with the principle of proportionality, taking into account, inter alia, the nature and gravity of the irregularities found and their financial impact on the fund concerned.

[Signatures]