



Reports of Cases

JUDGMENT OF THE COURT (Tenth Chamber)

10 July 2014*

(Request for a preliminary ruling — Public procurement — Contracts falling below the threshold provided for in Directive 2004/18/EC — Articles 49 TFEU and 56 TFEU — Principle of proportionality — Conditions for exclusion from a tender procedure — Criteria for qualitative selection relating to the personal situation of the tenderer — Obligations relating to the payment of social security contributions — Definition of serious infringement — Difference between the sums owed and those paid which exceeds EUR 100 and is greater than 5% of the sums owed)

In Case C-358/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunale amministrativo regionale per la Lombardia (Italy), made by decision of 15 March 2012, received at the Court on 30 July 2012, in the proceedings

Consorzio Stabile Libor Lavori Pubblici

v

Comune di Milano,

intervener:

Pascolo Srl,

THE COURT (Tenth Chamber),

composed of A. Rosas, acting as President of the Tenth Chamber, D. Šváby and C. Vajda (Rapporteur),
Judges,

Advocate General: M. Wathelet,

Registrar: A. Impellizzeri, Administrator,

having regard to the written procedure and further to the hearing on 11 July 2013,

after considering the observations submitted on behalf of:

- Consorzio Stabile Libor Lavori Pubblici, by N. Seminara, R. Invernizzi and M. Falsanisi, avvocati,
- Comune di Milano, by M. Maffey and S. Pagano, avvocati,
- Pascolo Srl, by A. Tornitore, F. Femiano, G. Fuzier and G. Sorrentino, avvocati,

* Language of the case: Italian.

- the Italian Government, by G. Palmieri, acting as Agent, and G. Aiello, avvocato dello Stato,
 - the Czech Government, by M. Smolek, acting as Agent,
 - the Polish Government, by B. Majczyna and M. Szpunar, acting as Agents,
 - the European Commission, by A. Tokár and L. Pignataro-Nolin, acting as Agents,
- having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,
gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Articles 49 TFEU, 56 TFEU and 101 TFEU.
- 2 The request has been made in proceedings between Consorzio Stabile Libor Lavori Pubblici ('Libor') and the Comune di Milano (Municipality of Milan) concerning the decision of the Comune di Milano to annul the definitive award of a public works contract to Libor on the ground that Libor had failed to fulfil its obligations relating to the payment of social security contributions in the amount of EUR 278.

Legal context

European Union law

- 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 (OJ 2004 L 134, p. 114), as amended by Commission Regulation (EC) No 1177/2009 of 30 November 2009 (OJ 2009 L 314, p. 64) ('Directive 2004/18'), states in recital 2 in its preamble:

'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. However, for public contracts above a certain value, it is advisable to draw up provisions of Community coordination of national procedures for the award of such contracts which are based on these principles so as to ensure the effects of them and to guarantee the opening-up of public procurement to competition. These coordinating provisions should therefore be interpreted in accordance with both the aforementioned rules and principles and other rules of the Treaty.'
- 4 Article 7 of Directive 2004/18 sets the threshold amounts from which the measures for coordinating procedures for the award of public works contracts, public supply contracts and public service contracts which it lays down apply. For public works contracts, Article 7(c) of that directive sets the threshold at EUR 4 845 000.

- 5 Article 45 of Directive 2004/18 concerns the criteria for qualitative selection relating to the personal situation of the candidate or tenderer. Article 45(2) provides:

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

...

- (e) has not fulfilled obligations relating to the payment of social security contributions in accordance with the legal provisions of the country in which he is established or with those of the country of the contracting authority;
- (f) has not fulfilled obligations relating to the payment of taxes in accordance with the legal provisions of the country in which he is established or with those of the country of the contracting authority;

...

Member States shall specify, in accordance with their national law and having regard for Community law, the implementing conditions for this paragraph.’

Italian law

- 6 Legislative Decree No 163 of 12 April 2006 establishing the Code on public works contracts, public service contracts and public supply contracts pursuant to Directives 2004/17/EC and 2004/18/EC (Decreto legislativo n. 163 — Codice dei contratti pubblici relativi a lavori, servizi e forniture in attuazione delle direttive 2004/17/CE e 2004/18/CE) (Ordinary Supplement to GURI No 100 of 2 May 2006), as amended by Decree-Law No 70 of 13 May 2011 (GURI No 110 of 13 May 2011, p. 1) converted into law by Law No 106 of 12 July 2011 (‘Legislative Decree No 163/2006’), governs, in their entirety, the procedures in Italy for the award of public works contracts, public service contracts and public supply contracts.
- 7 Legislative Decree No 163/2006 contains, in Part II, among the provisions applicable regardless of the amount of the contract, Article 38 which lays down the general requirements for participation in procedures for the award of concessions and contracts for works, supplies and services. Article 38(1)(i) of the decree provides:
- ‘1. Persons shall be excluded from participation in procedures for the award of concessions and contracts for works, supplies and services, cannot be awarded subcontracts and cannot enter into related contracts, if:
- ...
- (i) they have committed serious infringements, definitively established, of the rules governing social security contributions, under Italian law or that of the State in which they are established’.
- 8 Article 38(2) of Legislative Decree No 163/2006 defines the concept of ‘serious’ infringement of the rules governing social security contributions. It provides, in essence, that, for the purposes of Article 38(1)(i) of the decree, failures are to be regarded as serious if they preclude the issue of a social security contributions payment certificate (documento unico di regolarità contributiva, ‘DURC’).

- 9 The infringements which preclude the issue of a DURC are identified by a Decree of the Ministry of Labour and Social Security of 24 October 2007 governing the social security contributions payment certificate (Decreto del ministero del lavoro e della previdenza sociale che disciplina il documento unico di regolarità contributiva) (GURI No 279 of 30 November 2007, p. 11). Article 8(3) of that Ministerial Decree provides:

‘For the sole purposes of participation in the tender procedure, a non-serious difference between the sums owed and those paid with regard to each social security institution and each construction fund shall not preclude the issue of a DURC. A difference equal to or less than 5% between the sums owed and those paid in respect of each payment or contribution period or, in any event, a difference less than EUR 100, shall not be regarded as serious, without prejudice to the obligation to pay that amount within thirty days of the DURC being issued.’

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

- 10 By notice of 6 June 2011, the Comune di Milano issued an invitation to tender for the award of a contract for ‘extraordinary maintenance and work to install intruder alarm systems in residential properties belonging to the Municipality of Milan’, to be awarded on the basis of the largest discount, starting from a basic contract value of EUR 4 784 914.61.
- 11 The notice expressly required each tenderer to declare, on pain of exclusion, that it satisfied the general requirements for participation in the tender procedure laid down in Article 38 of Legislative Decree No 163/2006.
- 12 Libor submitted an application to participate in the tender procedure and declared, in the wording of Article 38(1)(i) of Legislative Decree No 163/2006, that it ‘had not committed any serious infringements, definitively established, of the rules governing social security contributions, under Italian law’.
- 13 On conclusion of the procedure, the Comune di Milano awarded the contract to Libor and notified it of that decision by note of 28 July 2011. It then checked the declaration given by the successful tenderer. To that end, it obtained the DURC from the competent administration, from which it was apparent that when Libor submitted its application to participate in the tender procedure it was not up to date with its social security contributions, since it had failed, within the time-limits laid down, to pay contributions in respect of May 2011 of EUR 278, which was the total amount of contributions due for that month. Libor paid that sum belatedly on 28 July 2011.
- 14 In the light of the infringement disclosed by the DURC, the Comune di Milano annulled the definitive award to Libor and excluded it from the procedure. The Comune di Milano identified Pascolo Srl as the new successful tenderer.
- 15 Libor brought an action in the Tribunale amministrativo regionale per la Lombardia (Lombardy Regional Administrative Court) against the decision to annul the award, contending in particular that Article 38(2) of Legislative Decree No 163/2006 is incompatible with EU law.
- 16 The referring court states that the tender procedure in question does not fall under Directive 2004/18 as the value of the contract at issue in the main proceedings is below the threshold set by Article 7(c) of that directive. It considers, nevertheless, that that tender procedure has cross-border interest, so that, according to the case-law of the Court, the basic rules of the FEU Treaty must be complied with. In that regard, the referring court entertains doubts as to whether Article 38(2) of Legislative Decree No 163/2006 is compatible with the principle of proportionality and the principle of equal treatment under EU law.

- 17 According to the referring court, by introducing a purely legal concept of ‘seriousness’ of the infringement relating to contributions, that provision has the effect of removing any discretion of the contracting authority in determining whether the requirement for participation of not being in arrears with contributions has been satisfied. The court considers that that exclusion is compatible as such with EU law, in that it reinforces equal treatment between the various economic operators taking part in a tender procedure.
- 18 However, the referring court is uncertain whether the criteria drawn up by the national legislature are consistent with the principle of proportionality. It notes that the condition of an undertaking’s compliance with its obligation to pay social security contributions was introduced in order to ensure the reliability, diligence and responsibility of the tendering undertaking and its proper conduct in relation to its employees. The referring court asks whether, in relation to a specific tender procedure, failure to comply with that condition is really a significant indication of the unreliability of an undertaking. It is an abstract criterion which takes no account of the characteristics of an individual tender procedure, in relation to its subject-matter and actual value, or of the turnover and economic and financial capacity of the undertaking which committed the infringement. Moreover, the exclusion of an undertaking from the tender procedure is disproportionate where, as in the case in the main proceedings, the infringement relates to a modest sum.
- 19 In addition, the referring court has doubts as to the consistency of the conditions for exclusion from the tender procedure for failure to pay social security contributions with those relating to the non-payment of taxes, according to which only those infringements concerning sums exceeding EUR 10 000 are classified as serious.
- 20 In those circumstances, the Tribunale amministrativo regionale per la Lombardia decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Do the principle of proportionality which arises from the right of establishment and the principles of non-discrimination and protection of competition laid down in Articles 49 [TFEU], 56 [TFEU] and 101 [TFEU], and the rule of reasonableness contained in that principle of proportionality, preclude national legislation which, in relation to contracts both above and below the [European Union] threshold, classifies as serious an infringement relating to contribution obligations which has been definitively established, where its amount exceeds EUR 100 and is at the same time greater than 5% of the difference between the sums owed and those paid in respect of each payment or contribution period, with the consequent obligation on the contracting authority to exclude from the tender process any tenderer who has committed such an infringement, without assessing other aspects which objectively demonstrate the tenderer’s reliability as a contractual partner?’

The question referred for a preliminary ruling

- 21 As a preliminary point, it should be noted that, although, as the question indicates, the national legislation in question in the main proceedings applies to tender procedures both above and below the thresholds laid down for public contracts in Article 7 of Directive 2004/18, the value of the public contract at issue in the main proceedings is less than the amount set in Article 7(c) of that directive.
- 22 In addition, it is apparent both from the wording of the question and the referring court’s observations, as summarised in paragraph 18 above, that the referring court questions in particular whether the national legislation in question in the main proceedings is consistent with the principle of proportionality.
- 23 Therefore, by its question, the referring court is asking, in essence, whether Articles 49 TFEU, 56 TFEU and 101 TFEU and the principle of proportionality must be interpreted as precluding national legislation which, with regard to public works contracts the value of which is below the threshold laid

down in Article 7(c) of Directive 2004/18, requires the contracting authorities to exclude from the award procedure for such a contract a tenderer who has committed an infringement relating to social security contributions where the difference between the sums owed and those paid exceeds EUR 100 and is greater than 5% of the sums owed.

- 24 It should be borne in mind at the outset that the application of Directive 2004/18 to a public contract is subject to the condition that the estimated value of the contract reaches the threshold laid down in Article 7 of that directive. Otherwise, the fundamental rules and the general principles of the Treaty apply, provided that the contract concerned has a certain cross-border interest in the light, inter alia, of its value and the place where it is performed (see, to that effect, *Ordine degli Ingegneri della Provincia di Lecce and Others*, C-159/11, EU:C:2012:817, paragraph 23 and the case-law cited). It is for the referring court to examine whether there is such an interest (see, to that effect, *Belgacom*, C-221/12, EU:C:2013:736, paragraph 30 and the case-law cited).
- 25 So, although the public works contract at issue in the main proceedings does not reach the threshold laid down in Article 7(c) of that directive, it must be concluded, in so far as the referring court considers that that contract has a certain cross-border interest, that those fundamental rules and general principles apply in the main proceedings.
- 26 As regards the provisions of the Treaty to which the referring court refers, exclusion from a procedure for the award of a public contract such as that at issue in the main proceedings is not an agreement between undertakings, a decision by associations of undertakings, or a concerted practice within the meaning of Article 101 TFEU. It is not therefore necessary to examine national legislation such as that at issue in the main proceedings in the light of Article 101 TFEU.
- 27 On the other hand, as is apparent from recital 2 in the preamble to Directive 2004/18, the principles of freedom of establishment and freedom to provide services and the principle of proportionality are among the principles of the Treaty which must be respected when awarding public contracts.
- 28 So far as concerns Articles 49 TFEU and 56 TFEU, according to settled case-law of the Court, those provisions preclude any national measure which, even though it is applicable without discrimination on grounds of nationality, is liable to prohibit, impede or render less attractive the exercise by nationals of the European Union of the freedom of establishment and the freedom to provide services guaranteed by those provisions of the Treaty (see, inter alia, *Serrantoni and Consorzio stabile edili*, C-376/08, EU:C:2009:808, paragraph 41).
- 29 As regards public contracts, it is the concern of the European Union, in relation to the freedom of establishment and the freedom to provide services, to ensure the widest possible participation by tenderers in a call for tenders (see, to that effect, *CoNISMa*, C-305/08, EU:C:2009:807, paragraph 37). The application of a provision which excludes persons who have committed serious infringements of national rules governing social security contributions from participating in procedures for the award of public works contracts, such as Article 38(1)(i) of Legislative Decree No 163/2006, may compromise the widest possible participation by tenderers in a call for tenders.
- 30 Such a national provision which is capable of excluding tenderers from participating in a procurement procedure with a certain cross-border interest amounts to a restriction within the meaning of Articles 49 TFEU and 56 TFEU.
- 31 However, such a restriction may be justified in so far as it pursues a legitimate objective in the public interest, and to the extent that it complies with the principle of proportionality in that it is suitable for securing the attainment of that objective and does not go beyond what is necessary in order to attain it (see, to that effect, *Serrantoni and Consorzio stabile edili*, EU:C:2009:808, paragraph 44).

- 32 In that regard, first, it is apparent from the order for reference that the objective pursued by the ground for exclusion from a procurement procedure set out in Article 38(1)(i) of Legislative Decree No 163/2006 is to ensure the reliability, diligence and responsibility of the tenderer and its proper conduct in relation to its employees. It must be considered that to ensure that the tenderer possesses such qualities constitutes a legitimate objective in the public interest.
- 33 Next, it must be stated that a ground for exclusion such as that in Article 38(1)(i) of Legislative Decree No 163/2006 is suitable for securing the attainment of the objective pursued, in so far as the failure by an economic operator to pay social security contributions gives an indication of the lack of reliability, diligence and responsibility of that operator with regard to complying with its legal and social obligations.
- 34 Lastly, as regards the need for such a measure, it must be noted, in the first place, that the establishment, under national legislation, of a precise threshold for the exclusion from procurement procedures, namely a difference between the sums owed in respect of social security contributions and those paid which exceeds EUR 100 and is greater than 5% of the sums owed, ensures not only equal treatment of tenderers but also legal certainty, a principle which must be complied with for a restrictive measure to be proportionate (see, to that effect, *Itelcar*, C-282/12, EU:C:2013:629, paragraph 44).
- 35 In the second place, as regards the level of the exclusion threshold laid down in the national legislation, it should be borne in mind that, so far as concerns public contracts falling within the scope of Directive 2004/18, Article 45(2) of that directive leaves the application of the cases of exclusion mentioned to the assessment of the Member States, as evidenced by the phrase ‘may be excluded from participation in a contract’ which appears at the beginning of that provision and makes express reference, inter alia in subparagraphs (e) and (f), to the provisions of national law (see, as regards Article 29 of Council Directive 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), *La Cascina and Others*, C-226/04 and C-228/04, EU:C:2006:94, paragraph 21). In addition, under the second subparagraph of Article 45(2), Member States are to specify, in accordance with their national law and having regard for EU law, the implementing conditions for that paragraph.
- 36 Accordingly, Article 45(2) of Directive 2004/18 does not provide for uniform application at EU level of the grounds of exclusion it mentions, since the Member States may choose not to apply those grounds of exclusion at all or to incorporate them into national law with varying degrees of rigour according to legal, economic or social considerations prevailing at national level. In that context, the Member States have the power to make the criteria laid down in Article 45(2) less onerous or more flexible (see, as regards Article 29 of Directive 92/50, *La Cascina and Others*, EU:C:2006:94, paragraph 23).
- 37 Article 45(2)(e) of Directive 2004/18 allows Member States to exclude from participation in a public contract any economic operator which has failed to fulfil its obligations relating to the payment of social security contributions without any minimum amount of outstanding contributions being set. In those circumstances, setting such a minimum amount in national law amounts to tempering the grounds for exclusion under that provision and cannot therefore be regarded as going beyond what is necessary. That is all the more true with regard to public contracts which fall below the threshold laid down in Article 7(c) of that directive and are thus not subject to the strict special procedures laid down in the directive.
- 38 In addition, the fact that the threshold for exclusion laid down in national law relating to the non-payment of taxes is, as the referring court has noted, considerably higher than the threshold for failure to pay social security contributions does not in itself have a bearing on whether the latter is proportionate. As is apparent from paragraph 36 above, Member States are free to incorporate the

grounds of exclusion laid down inter alia in Article 45(2)(e) and (f) of Directive 2004/18 into national law with varying degrees of rigour according to legal, economic or social considerations prevailing at national level.

- 39 Moreover, this situation can be distinguished from that in *Hartlauer* (C-169/07, EU:C:2009:141), in which the Court held that the national legislation in question was not appropriate for ensuring attainment of the objectives pursued in so far as it did not attain them in a consistent and systematic manner. By contrast with the legislation examined in *Hartlauer*, the measure at issue in the main proceedings is based, as follows from paragraph 34 above, on objective, non-discriminatory criteria known in advance (see, to that effect, *Hartlauer*, EU:C:2009:141, paragraph 64).
- 40 It follows that a national measure such as that at issue in the main proceedings cannot be regarded as going beyond what is necessary to attain the objective pursued.
- 41 In the light of all the foregoing considerations, the answer to the question referred is that Articles 49 TFEU and 56 TFEU and the principle of proportionality must be interpreted as not precluding national legislation which, with regard to public works contracts the value of which is below the threshold laid down in Article 7(c) of Directive 2004/18, requires the contracting authorities to exclude from the award procedure for such a contract a tenderer who has committed an infringement relating to social security contributions where the difference between the sums owed and those paid exceeds EUR 100 and is greater than 5% of the sums owed.

Costs

- 42 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 (Tenth Chamber) hereby rules:

Articles 49 TFEU and 56 TFEU and the principle of proportionality must be interpreted as not precluding national legislation which, with regard to public works contracts the value of which is below the threshold laid down in Article 7(c) 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, as amended by Commission Regulation (EC) No 1177/2009 of 30 November 2009, requires the contracting authorities to exclude from the award procedure for such a contract a tenderer who has committed an infringement relating to social security contributions where the difference between the sums owed and those paid exceeds EUR 100 and is greater than 5% of the sums owed.

[Signatures]