



## Reports of Cases

ORDER OF THE COURT (Ninth Chamber)

4 June 2019\*

(Reference for a preliminary ruling — Article 99 of the Rules of Procedure of the Court of Justice — Public procurement in the water, energy, transport and postal services sectors — Directive 2004/18/EC — Point (d) of the first subparagraph of Article 45(2) — Grounds for exclusion — Grave professional misconduct — Infringement of competition rules)

In Case C-425/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunale amministrativo regionale per il Piemonte (Regional Administrative Court of Piedmont, Italy), made by decision of 7 February 2018, received at the Court on 28 June 2018, in the proceedings

**Consorzio Nazionale Servizi Società Cooperativa (CNS)**

v

**Gruppo Torinese Trasporti GTT SpA,**

intervening parties:

**Consorzio Stabile Gestione Integrata Servizi Aziendali GISA,**

**La Lucente SpA,**

**Dussmann Service Srl,**

**So.Co.Fat. SC,**

THE COURT (Ninth Chamber),

composed of K. Jürimäe, President of the Chamber, D. Šváby (Rapporteur) and S. Rodin, Judges,

Advocate General: P. Pikamäe,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Consorzio Nazionale Servizi Società Cooperativa (CNS), by F. Cintioli, G. Notarnicola, E. Perrettini and A. Police, avvocati,

\* Language of the case: Italian.

- the Italian Government, by G. Palmieri, acting as Agent, and by D. Del Gaizo, avvocato dello Stato,
- the European Commission, by G. Gattinara and P. Ondrůšek and by L. Haasbeek, acting as Agents,

having decided, after hearing the Advocate General, to give a decision by reasoned order, pursuant to Article 99 of the Rules of Procedure of the Court of Justice,

makes the following

### Order

- 1 This request for a preliminary ruling relates to the interpretation of Article 53(3) and Article 54(4) 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) 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 has been made in proceedings between Consorzio Nazionale Servizi Società Cooperativa (CNS) and Gruppo Torinese Trasporti GTT SpA ('GTT') seeking, inter alia, annulment of the decision of GTT to withdraw the award to CNS of a public contract.

### Legal context

#### *EU law*

##### *Directive 2004/17*

- 3 Article 53(3) of Directive 2004/17, under the heading 'Qualification systems', and Article 54(4) of the same directive, under the heading 'Criteria for qualitative selection', provide that the criteria and rules for qualification and also the criteria for qualitative selection 'may include the exclusion criteria listed in Article 45 of Directive 2004/18 on the terms and conditions set out therein'.

##### *Directive 2004/18*

- 4 Article 45 of Directive 2004/18, which is headed 'Personal situation of the candidate or tenderer', appears in a section entitled 'Criteria for qualitative selection' and provides as follows:

'...

2. 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;

...

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

...'

### ***Italian law***

5 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 (Legislative Decree No 163 establishing the Code on public works contracts, public service contracts and public supply contracts pursuant to Directives 2004/17/EC and 2004/18/EC) of 12 April 2006 (Ordinary Supplement to GURI No 100 of 2 May 2006) ('the Code on public contracts') transposed Directives 2004/17 and 2004/18 into Italian law.

6 Article 38 of the Code on public contracts, entitled 'General requirements', listed, in paragraph 1, the grounds on which an economic operator may be excluded from participating in a public contract:

'The following persons shall be excluded from participation in procedures for the award of concessions and public works contracts, supply contracts and service contracts and may not be awarded subcontracts or conclude any related contract:

...

(f) any person who, in the reasoned assessment of the contracting authority, has been guilty of serious negligence or bad faith in the performance of any contract awarded to that person by the contracting authority which published the contract notice or any person who has been found guilty of grave professional misconduct proven by any means which the contracting authority can demonstrate;

...'

7 Article 230(1) of that code provided as follows:

'Contracting entities shall apply Article 38 to verify that candidates or tenderers comply with the general requirements.'

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

8 GTT is a company operating urban railway, tramway, trolleybus and bus transport services.

9 By a notice sent for publication in the *Official Journal of the European Union* on 30 July 2015 and a letter of invitation of 27 November 2015, GTT opened a restricted procedure, in accordance with Directive 2004/17, for the procurement of services for the cleaning of vehicles, premises and sites, services for the movement and refuelling of vehicles, and ancillary services at the contracting authority's establishments.

10 GTT stated that the total value of the contract, consisting of six lots, was EUR 29 434 319.39 excluding value added tax (VAT), the value of each lot being between EUR 4 249 999.10 and EUR 6 278 734.70.

11 Having awarded three of those lots to CNS, GTT then withdrew that award, by a decision of 14 July 2017 ('the contested decision'). In so doing, it relied on a decision of the Autorità Garante della Concorrenza e del Mercato (Competition Authority, Italy) ('the AGCM') of 22 December 2015 ('the

AGCM's decision'), which imposed a fine of EUR 56 190 090 on CNS for having participated in an anticompetitive horizontal agreement, with the aim of influencing the outcome of a procurement procedure opened by another administration.

- 12 In the contested decision, it was also noted that the AGCM's decision had already been upheld by a judicial decision with the force of *res judicata*. The contested decision relies additionally on two judgments, of 29 March and 3 April 2017, in which the referring court held that an anticompetitive agreement implemented by the operator in question in another procurement procedure and established in the course of administrative proceedings constituted grave professional misconduct within the meaning of Article 38(1)(f) of the Code on public contracts and point (d) of the first subparagraph of Article 45(2) of Directive 2004/18. It is also claimed, first, that, in the procedure for the award of the contract in question, CNS failed to mention in its participation file that penalty proceedings were pending against it before the AGCM and, secondly, that CNS only put compliance measures into place during the course of the procurement procedure, meaning that, at the start of the procedure, the ground for exclusion still existed.
- 13 GTT therefore took the view that the conduct penalised by the AGCM was such as to break the relationship of trust with the contracting authority.
- 14 By an interim order of 11 October 2017, the referring court dismissed an application for interim measures submitted by CNS.
- 15 Both that interim order and the judgments delivered by the referring court on 29 March and 3 April 2017 were reversed by the Consiglio di Stato (Council of State, Italy) by, respectively, an order of 20 November 2017 and two decisions of 4 December 2017 and 5 February 2018. According to the explanations provided by the referring court, those decisions make it clear that conduct constituting an infringement in competition matters cannot be classified as 'grave professional misconduct' for the purposes of the application of Article 38(1)(f) of the Code on public contracts and that 'only failures and negligence committed in the performance of a public contract' can be classified as such. 'Matters, even unlawful ones, which occurred during the preceding award procedure should therefore be ruled out.' That interpretation is based on the legal certainty of economic operators. According to the Consiglio di Stato (Council of State), that interpretation is compatible with the judgment of 18 December 2014, *Generali-Providencia Biztosító* (C-470/13, EU:C:2014:2469), from which it can be inferred only that national legislation which expressly classifies an infringement of competition law as 'grave professional misconduct' does not breach EU law, and not that EU law requires such infringements to be included in the concept of 'grave professional misconduct'. It follows that, under Italian law, the commission of such infringements is irrelevant in public procurement procedures governed by the Code on public contracts.
- 16 CNS relies on those three decisions of the Consiglio di Stato (Council of State) in support of its action for annulment of the contested decision.
- 17 Referring to the judgment of 13 December 2012, *Forposta and ABC Direct Contact* (C-465/11, EU:C:2012:801, paragraph 33), the referring court observes, however, that, since the Italian Republic had availed itself of the power granted to Member States by Article 54(4) of Directive 2004/17 to include the exclusion criteria listed in Article 45 of Directive 2004/18 in the criteria for the qualitative selection of operators in the special sectors, the Court's case-law relating to that provision is relevant to the case in the main proceedings, even though it concerns a restricted procedure under Directive 2004/17.
- 18 The referring court further observes that, in the judgments of 13 December 2012, *Forposta and ABC Direct Contact* (C-465/11, EU:C:2012:801, paragraph 27), and of 18 December 2014, *Generali-Providencia Biztosító* (C-470/13, EU:C:2014:2469, paragraph 35), the Court already clarified that the concept of 'professional misconduct' covers all wrongful conduct having an impact on the

professional credibility of the operator at issue and that the commission of an infringement of the competition rules, in particular where that infringement has been penalised by a fine, constitutes a cause for exclusion under point (d) of the first subparagraph of Article 45(2) of Directive 2004/18.

- 19 The referring court essentially infers, from a comparison of the judgments of 9 February 2006, *La Cascina and Others* (C-226/04 and C-228/04, EU:C:2006:94, paragraph 23), and of 13 December 2012, *Forposta and ABC Direct Contact* (C-465/11, EU:C:2012:801, paragraph 25), that Member States have a limited power of assessment with regard to the optional grounds for exclusion which do not refer to national legislation or rules to specify the implementing conditions thereof.
- 20 However, since the referring court considers the Court's case-law on the so-called 'optional' grounds for exclusion, which developed pursuant to 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) and Directive 2004/18, to be ambiguous in its interpretation, it is seeking clarification from the Court in this regard.
- 21 In those circumstances, the Tribunale amministrativo regionale per il Piemonte (Regional Administrative Court of Piedmont, Italy) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Do Articles 53(3) and 54(4) of [Directive 2004/17], in conjunction with [point (d) of the first subparagraph of Article 45(2)] of [Directive 2004/18], preclude a provision such as Article 38(1)(f) of [the Code on public contracts], as interpreted by national case-law, which excludes from the scope of "grave professional misconduct" on the part of an economic operator conduct consisting in infringement of the competition rules, which has been established and penalised by the national competition authority by decision upheld by the courts, thereby precluding a priori the contracting authorities from assessing such infringements independently for the purposes of determining whether such an economic operator is to be excluded from a tender procedure for the award of a public contract, as a possible but not a mandatory outcome?'

### **Consideration of the question referred**

- 22 Under Article 99 of the Rules of Procedure of the Court, where the reply to a question referred to the Court for a preliminary ruling may be clearly deduced from existing case-law or where the answer to the question referred admits of no reasonable doubt, the Court may at any time, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, decide to rule by reasoned order.
- 23 That provision must be applied in the present case.
- 24 By its question, the referring court is essentially asking whether point (d) of the first subparagraph of Article 45(2) of Directive 2004/18 must be interpreted as precluding national legislation, such as Article 38(1)(f) of the Code on public contracts, which is interpreted as excluding from the scope of 'grave professional misconduct' on the part of an economic operator conduct consisting in infringement of the competition rules, which has been established and penalised by the national competition authority by decision upheld by the courts, thereby precluding the contracting authorities from assessing such infringements independently for the purposes of determining whether such an economic operator is potentially to be excluded from a procedure for the award of a public contract.
- 25 According to settled case-law, Article 45(2) of Directive 2004/18 does not provide for uniform application at national 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 that

provision less onerous or more flexible (judgments of 10 July 2014, *Consorzio Stabile Libor Lavori Pubblici*, C-358/12, EU:C:2014:2063, paragraph 36, and of 14 December 2016, *Connexxion Taxi Services*, C-171/15, EU:C:2016:948, paragraph 29).

- 26 That being the case, it must be noted that point (d) of the first subparagraph of Article 45(2) of Directive 2004/18, unlike the provisions relating to the grounds for exclusion in points (a), (b), (e) and (f) of the same subparagraph, does not refer to national legislation or rules, but that the second subparagraph of Article 45(2) provides that Member States shall specify, in accordance with their national law and having regard for EU law, its implementing conditions, (judgment of 13 December 2012, *Forposta and ABC Direct Contact*, C-465/11, EU:C:2012:801, paragraph 25).
- 27 It is therefore clear from the case-law — and as the referring court has observed — that where an optional ground for exclusion provided for in Article 45(2) of Directive 2004/18, such as that contained in point (d) of the first subparagraph thereof, does not refer to national law, the Member States' discretion is more strictly circumscribed. In such a case, it falls to the Court to define the scope of such an optional ground for exclusion (see, to that effect, judgments of 13 December 2012, *Forposta and ABC Direct Contact*, C-465/11, EU:C:2012:801, paragraphs 25 to 31, and of 18 December 2014, *Generali-Providencia Biztosító*, C-470/13, EU:C:2014:2469, paragraph 35).
- 28 Consequently, the concepts of 'professional' 'grave' 'misconduct', in point (d) of the first subparagraph of Article 45(2) can be specified and explained in national law, provided that it has regard for EU law (judgment of 13 December 2012, *Forposta and ABC Direct Contact*, C-465/11, EU:C:2012:801, paragraph 26).
- 29 In that regard, it should be noted that the concept of 'professional misconduct' covers all wrongful conduct which has an impact on the professional credibility of the operator at issue (judgment of 13 December 2012, *Forposta and ABC Direct Contact*, C-465/11, EU:C:2012:801, paragraph 27), or on its integrity or reliability.
- 30 It follows that the concept of 'professional misconduct', which is interpreted broadly, cannot be limited only to failures and negligence committed in the performance of a public contract.
- 31 In addition, the concept of 'grave 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 (judgment of 13 December 2012, *Forposta and ABC Direct Contact*, C-465/11, EU:C:2012:801, paragraph 30).
- 32 Finally, point (d) of the first subparagraph of Article 45(2) of Directive 2004/18 allows the contracting authorities to prove professional misconduct by any demonstrable means. Since a judgment which has the force of *res judicata* is not required in order to prove professional misconduct (judgment of 13 December 2012, *Forposta and ABC Direct Contact*, C-465/11, EU:C:2012:801, paragraph 28), the decision of a national competition authority establishing that an operator has infringed the competition rules can undoubtedly be indicative of the existence of grave misconduct by that operator.
- 33 In those circumstances, the commission of an infringement of the competition rules, in particular where that infringement has been penalised by a fine, constitutes a ground for exclusion under point (d) of the first subparagraph of Article 45(2) of Directive 2004/18 (judgment of 18 December 2014, *Generali-Providencia Biztosító*, C-470/13, EU:C:2014:2469, paragraph 35).
- 34 It should be noted, however, that the decision of a national competition authority establishing an infringement of the competition rules does not necessarily result in the automatic exclusion of an economic operator from a procedure for the award of a public contract. In accordance with the principle of proportionality, a finding of 'grave misconduct' requires, in principle, a specific and

individual assessment of the conduct of the economic operator concerned to be carried out (see, to that effect, judgment of 13 December 2012, *Forposta and ABC Direct Contact* (C-465/11, EU:C:2012:801, paragraph 31).

- 35 In the light of all the foregoing considerations, the answer to the question referred is that point (d) of the first subparagraph of Article 45(2) of Directive 2004/18 must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which is interpreted as excluding from the scope of ‘grave professional misconduct’ on the part of an economic operator conduct consisting in infringement of the competition rules, which has been established and penalised by the national competition authority by decision upheld by the courts, thereby precluding the contracting authorities from assessing such infringements independently for the purposes of determining whether such an economic operator is potentially to be excluded from a procedure for the award of a public contract.

### Costs

- 36 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 (Ninth Chamber) hereby rules:

**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 must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which is interpreted as excluding from the scope of ‘grave professional misconduct’ on the part of an economic operator conduct consisting in infringement of the competition rules, which has been established and penalised by the national competition authority by decision upheld by the courts, thereby precluding the contracting authorities from assessing such infringements independently for the purposes of determining whether such an economic operator is potentially to be excluded from a procedure for the award of a public contract.**

[Signatures]