Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

27 November 2019*

(Reference for a preliminary ruling – Articles 49 and 56 TFEU – Public procurement – Directive 2004/18/EC – Article 25 – Subcontracting – National legislation limiting the possibility of subcontracting to 30% of the total value of the public contract and prohibiting prices for subcontracted works, supplies or services from being reduced by more than 20% compared to the prices stated in the decision awarding the contract)

In Case C-402/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Consiglio di Stato (Council of State, Italy), made by decision of 10 May 2018, received at the Court on 15 June 2018, in the proceedings

Tedeschi Srl, acting on its own behalf and as agent of a temporary association of undertakings,

Consorzio Stabile Istant Service, acting on its own behalf and as principal of a temporary association of undertakings,

v

C.M. Service Srl,

Università degli Studi di Roma La Sapienza,

THE COURT (Fifth Chamber),

composed of E. Regan (Rapporteur), President of the Chamber, I. Jarukaitis, E. Juhász, M. Ilešič and C. Lycourgos, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: R. Schiano, Administrator,

having regard to the written procedure and further to the hearing on 15 May 2019,

after considering the observations submitted on behalf of

– Tedeschi Srl, acting on its own behalf and as agent of a temporary association of undertakings, and Consorzio Stabile Istant Service, acting on its own behalf and as principal of a temporary association of undertakings, by A. Clarizia, P. Ziotti, E. Perrettini, L. Albanese and G. Zurlo, avvocati,

* Language of the case: Italian.

– C.M. Service Srl, by F. Cardarelli, avvocato,

– the Università degli Studi di Roma La Sapienza, by G. Bernardi, avvocato,

– the Italian Government, by G. Palmieri, acting as Agent, and C. Colelli and V. Nunziata, avvocati dello Stato,

– the Austrian Government, by G. Hesse, acting as Agent,

– the European Commission, by G. Gattinara, P. Ondrůšek and L. Haasbeek, acting as Agents,

– the Norwegian Government, by K.H. Aarvik, C. Anker and H. Røstum, 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 and 56 TFEU, Article 25 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, and corrigendum OJ 2004 L 351, p. 44), Article 71 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 (OJ 2014 L 94, p. 65), and the principle of proportionality.

2 The request was made in proceedings between, of the one part, Tedeschi Srl, acting on its own behalf and as agent for a temporary association of undertakings, and Consorzio Stabile Istant Service, acting on its own behalf and as principal of a temporary association of undertakings (jointly 'GTE Tedeschi'), and, of the other part, C.M. Service Srl and the Università degli Studi di Roma La Sapienza (La Sapienza University, Rome, Italy) concerning the award of a public contract for cleaning services.

Legal context

EU law

Directive 2004/18

3 Recitals 2, 6, 32 and 43 of Directive 2004/18 state:

'(2) 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 …, 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.

…

(6) Nothing in this Directive should prevent the imposition or enforcement of measures necessary to protect public policy, public morality, public security …, provided that these measures are in conformity with the Treaty.

…

(32) In order to encourage the involvement of small and medium-sized undertakings in the public contracts procurement market, it is advisable to include provisions on subcontracting.

…

(43) The award of public contracts to economic operators who have participated in a criminal organisation or who have been found guilty of corruption or of fraud to the detriment of the financial interests of the European Communities or of money laundering should be avoided …'

4 Article 7 of that directive, entitled 'Threshold amounts for public contracts', provides:

'This Directive shall apply to public contracts which are not excluded in accordance with the exceptions provided for in Articles 10 and 11 and Articles 12 to 18 and which have a value exclusive of value-added tax (VAT) estimated to be equal to or greater than the following thresholds:

…

(b) EUR 207 000 …'

5 Article 25 of that directive, entitled 'Subcontracting', provides:

'In the contract documents, the contracting authority may ask or may be required by a Member State to ask the tenderer to indicate in his tender any share of the contract he may intend to subcontract to third parties and any proposed subcontractors.

…'

6 Article 26 of the same directive, entitled 'Conditions for performance of contracts', reads as follows:

'Contracting authorities may lay down special conditions relating to the performance of a contract, provided that these are compatible with Community law and are indicated in the contract notice or in the specifications. The conditions governing the performance of a contract may, in particular, concern social and environmental considerations.'

7 Under Article 45 of Directive 2004/18, entitled 'Personal situation of the candidate or tenderer':

'1. Any candidate or tenderer who has been the subject of a conviction by final judgment of which the contracting authority is aware for one or more of the reasons listed below shall be excluded from participation in a public contract:

(a) participation in a criminal organisation, as defined in Article 2(1) of Council Joint Action 98/733/JHA [of 21 December 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union (OJ 1998 L 351, p. 1)];

(b) corruption, as defined in Article 3 of the Council Act of 26 May 1997 [drawing up, on the basis of Article K.3(2)(c) of the Treaty on European Union, the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union (OJ 1997 C 195, p. 1),] and Article 3(1) of Council Joint Action 98/742/JHA [of 22 December 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on corruption in the private sector (OJ 1998 L 358, p. 2)];

(c) fraud within the meaning 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 of 26 July 1995 (OJ 1995 C 316, p. 48)];

…'

8 Article 47 of that directive, entitled 'Economic and financial standing', provides in paragraphs 2 and 3:

'2. An economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. It must in that case prove to the contracting authority that it will have at its disposal the resources necessary, for example, by producing an undertaking by those entities to that effect.

3. Under the same conditions, a group of economic operators as referred to in Article 4 may rely on the capacities of participants in the group or of other entities.'

9 Article 48 of that directive, entitled 'Technical and/or professional ability', provides in paragraphs 3 and 4:

'3. An economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. It must in that case prove to the contracting authority that it will have at its disposal the resources necessary for the execution of the contract, for example, by producing an undertaking by those entities to place the necessary resources at the disposal of the economic operator.

4. Under the same conditions a group of economic operators as referred to in Article 4 may rely on the abilities of participants in the group or in other entities.'

10 Article 55 of the same directive, entitled 'Abnormally low tenders', provides in paragraph 1:

'If, for a given contract, tenders appear to be abnormally low in relation to the goods, works or services, the contracting authority shall, before it may reject those tenders, request in writing details of the constituent elements of the tender which it considers relevant.

…'

Directive 2014/24

11 Article 90(1) of Directive 2014/24 provides:

'Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 18 April 2016. …'

Italian law

12 Article 118 of 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 adopting the Code on public works contracts, public service contracts and public supply contracts and transposing Directives 2004/17/EC and 2004/18/EC) of 12 April 2006 (Ordinary Supplement to the GURI No 100 of 2 May 2006, 'Legislative Decree No 163/2006') provides:

'…

2. The contracting authority is required to specify in the project and contract notice the particular supplies, services or works to be provided and, for works, the main category with its value as well as other categories covering all other operations envisaged in the project, also with their value. All works, supplies or services and operations, regardless of the category to which they belong, may be subcontracted and assigned on a piecemeal basis. In the case of works, as regards the main category, the proportion that may be subcontracted is specified by regulation and may vary depending on the category but may in no case exceed [30%]. In the case of services and supplies, that proportion pertains to the total value of the contract. …

…

4. The successful tenderer must, in respect of subcontracted works, supplies or services, apply the unit prices stated in the decision to award the contract, without a reduction of greater than [20%] …'

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

13 By a public procurement notice published in the *Official Journal of the European Union* in December 2015, La Sapienza University, Rome, launched an open tender procedure for the award of a public contract for cleaning services. That five-year public contract was to be awarded on the basis of the most economically advantageous tender. The basic value of the public contract was estimated at EUR 46 300 968.40, excluding value added tax (VAT).

14 C. M. Service, which was ranked second at the end of the tendering procedure, brought an action before the Tribunale amministrativo regionale del Lazio (Lazio Regional Administrative Court, Italy) seeking the annulment of the decision of La Sapienza University, Rome, of 12 April 2017 to award the public contract at issue in the main proceedings to GTE Tedeschi for a total value of EUR 31 744 359.67, excluding VAT and security costs. In support of its action, C. M. Service argued that the general restrictions provided for in Italian law had been infringed because the share of the public contract that the successful tenderer intended to subcontract represented more than 30% of its total value. It also argued that the bid submitted by the successful tenderer had not been subject to a reliable examination by the contracting authority by reference to the actual situation, since the contracting authority had accepted, in breach of the relevant provisions of Italian law, that the subcontractors would be remunerated more than 20% less than the unit prices stated in the decision awarding the contract.

15 The Tribunale amministrativo regionale per il Lazio (Lazio Regional Administrative Court) upheld the action. First, that court found that a reliable examination had not taken place of the characteristics of the significant use of social cooperatives as subcontractors, which formed an essential element of the successful tender and accounted for the sizeable reduction offered. Secondly, the court found that the remuneration for subcontracted tasks would be more than 20% lower than that paid by GTE Tedeschi to persons whom it employed directly.

16 GTE Tedeschi appealed against the judgment of the Tribunale amministrativo regionale del Lazio (Lazio Regional Administrative Court) to the referring court. C. M. Service also brought a cross-appeal, in which it re-submitted the claims which had not been upheld at first instance and alleged infringement of the provisions of Italian law prohibiting the subcontracting of works, supplies or services worth more than 30% of the total value of the public contract concerned.

17 The referring court is uncertain whether the Italian public procurement legislation is compatible with EU law.

18 In particular, that court observes that the restrictions set out in national law on subcontracting may make it more difficult for undertakings, particularly small and medium-sized undertakings, to access public contracts, thereby hindering the exercise of freedom of establishment and the freedom to provide services. It states that those restrictions may also deprive public purchasers of the opportunity to receive a greater number and variety of tenders. Allowing subcontracting to be used for only part of the contract, set in abstract terms as a certain percentage of the value thereof, irrespective of the possibility of verifying the capacity of potential subcontractors and without mention of the essential character of the tasks in question is not provided for under Directive 2004/18 and runs counter to the objectives of the opening up of competition and facilitating access to public contracts by small and medium-sized enterprises.

19 However, the national court also observes that, in the advisory opinions that it has delivered on national legislation on subcontracting, it has found that the objective of safeguarding the integrity of public contracts and preventing their infiltration by criminal organisations could justify a restriction on freedom of establishment and the freedom to provide services. It also sets out other reasons which, in its view, justify the thresholds at issue in the main proceedings. Thus, it states, first, that if the 20% limit laid down in Article 118(4) of Legislative Decree No 163/2006 were to be abolished, covert forms of 'wage dumping', liable to have an anti-competitive effect, could be practised. Secondly, it states that, if the 30% limit laid down in Article 118(2) of Legislative Decree No 163/2006 were abolished, the implementation of certain public contracts could be jeopardised because of the difficulty which might arise in assessing the viability of – and thus the absence of irregularities in – tenders, as in the case in the main proceedings.

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

'Do the principles of freedom of establishment and freedom to provide services referred to in Articles 49 and 56 [TFEU], Article 25 of Directive [2004/18] and Article 71 of Directive [2014//24], which do not contemplate any limits on the proportion of the contract that may be subcontracted or on the reduction in prices that may be applied to subcontractors, and the EU-law principle of proportionality preclude the application of national rules on public procurement, such as the Italian rules contained in Article 118(2) and (4) of Legislative Decree No [163/ 2006], pursuant to which no more than 30% of the total value of the contract may be subcontracted and the successful contractor must apply in respect of the subcontracted services the same unit prices as those stipulated in the decision awarding the contract, with a reduction of not more than 20%?'

21 The referring court's application for its request for a preliminary ruling to be determined pursuant to an expedited procedure under Article 105(1) of the Rules of Procedure of the Court of Justice was refused by order of the President of the Court of 18 September 2018, *Tedeschi and Consorzio Stabile Istant Service* (C-402/18, unpublished, EU:C:2018:762).

Consideration of the question referred

Admissibility

22 The Italian Government expresses doubts as to whether the national court has sufficiently described the legal context in which the question referred has arisen.

23 In addition, C. M. Service submits that the question referred is inadmissible, since it is not relevant to settling the dispute in the main proceedings. In particular, regardless of the Court's answer to that question, the referring court should, in any event, find that the tenderer infringed the tender that was selected in the procedure at issue in those proceedings since, when that tenderer submitted its tender, it undertook to comply with the 30% and 20% limits to which the national court refers in its question.

24 First, the Court points out that, according to settled case-law, questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining, the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. The Court may refuse to rule on a question referred for a preliminary ruling from 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, which requires the national court to define the factual and legal context of the questions it is asking or, at the very least, to explain the factual circumstances on which those questions are based (judgment of 28 March 2019, *Idi*, C-101/18, EU:C:2019:267, paragraph 28 and the case-law cited).

25 In the present case, the factual and legal circumstances stated in the order for reference make it possible to understand why the national court has made this request for a preliminary ruling.

26 Second, as regards the alleged irrelevance of the question raised, it should be borne in mind that the main proceedings concern the legality of the tender selected by the contracting authority in the public procurement procedure at issue in the main proceedings. However, as is apparent from the order for reference, the limits of 30% and 20% laid down by the national legislation at issue in the main proceedings – whose compatibility with EU law is the subject of the question referred by the national court – were exceeded by the price proposed in that tender, allowing it to be selected. It follows that, as the national court indeed observes, the outcome of the case before it necessarily depends on the Court's answer to that question.

27 The question is, therefore, admissible.

The first part of the question

28 By the first part of its question, the referring court asks, in essence, whether Articles 49 and 56 TFEU, Directive 2004/18 and Directive 2014/24 must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which restricts to 30% the share of the contract which the tenderer is permitted to subcontract to third parties ('the 30% limit').

29 As a preliminary point, it should be borne in mind that the applicable directive is, as a rule, the one in force when the contracting authority chooses the type of procedure to be followed and decides definitively whether it is necessary for a prior call for competition to be issued for the award of a public contract. Conversely, a directive is not applicable if the period prescribed for its transposition expired after that point in time (judgment of 10 July 2014, *Impresa Pizzarotti*, C-213/13, EU:C:2014:2067, paragraph 31 and the case-law cited).

30 In that respect, it must be pointed out that Directive 2004/18 was repealed by Directive 2014/24 with effect from 18 April 2016. Article 90 of Directive 2014/24 provides that Member States are to bring into force the laws, regulations and administrative provisions necessary to comply with that directive by 18 April 2016, subject to certain exceptions.

31 Consequently, at the date of the contract notice at issue in the main proceedings, 24 December 2015, Directive 2004/18 was still applicable, so that the first part of the question must be interpreted as seeking, inter alia, the interpretation of that directive, not Directive 2014/24.

32 Moreover, it should be noted that since the value, net of VAT, of the contract at issue in the main proceedings is greater than the threshold prescribed by Article 7(b) of Directive 2004/18, it is in the light of that directive that the first part of the question raised must be answered.

33 Directive 2004/18, as is apparent, in essence, from recital 2 thereof, seeks to ensure compliance, in the award of public contracts, with, inter alia, the free movement of goods, freedom of establishment and the freedom to provide services, as well as with the principles deriving therefrom, in particular equal treatment, non-discrimination, proportionality and transparency, and to ensure that public procurement is opened up to competition.

34 In particular, to that end, the directive expressly contemplates, in Article 47(2) and (3) and Article 48(3) and (4), the possibility for tenderers to rely, subject to certain conditions, on the capacities of other entities to meet certain selection criteria for economic operators.

35 Furthermore, pursuant to the first paragraph of Article 25 of Directive 2004/18, the contracting authority may ask or may be required by a Member State to ask the tenderer to indicate in his or her tender any share of the contract he or she intends to subcontract to third parties and any proposed subcontractors.

36 It follows that Directive 2004/18 provides for the possibility for tenderers to rely on subcontractors for the performance of a contract (see, to that effect, judgment of 14 July 2016, *Wrocław – Miasto na prawach powiatu*, C-406/14, EU:C:2016:562, paragraphs 31 to 33).

37 Nonetheless, where the procurement documents require tenderers to indicate, in their tenders, the share of the contract they may intend to subcontract and the proposed subcontractors, in accordance with the first paragraph of Article 25 of Directive 2004/18, the contracting authority is entitled to prohibit use of subcontractors whose capacities could not be verified at the level of examination of tenders and selection of the contractor, for the performance of essential parts of the contract (judgement of 14 July 2016, *Wrocław – Miasto na prawach powiatu*, C-406/14, EU:C:2016:562, paragraph 34 and the case-law cited).

38 Such is not, however, the effect of national legislation such as that at issue in the main proceedings, which imposes a limit on the use of subcontractors for a share of the value of the contract fixed in abstract terms as a certain percentage of that contract, and this irrespective of the possibility of verifying the capacities of potential subcontractors and the essential character of the tasks which would be concerned. In all those respects, legislation providing for a restriction such as the 30% limit is incompatible with Directive 2004/18 (see, by analogy, judgment of 14 July 2016, *Wrocław – Miasto na prawach powiatu*, C-406/14, EU:C:2016:562, paragraph 35).

39 That interpretation is consistent with the objective pursued by the directives in this area of attaining the widest possible opening up of public contracts to competition to the benefit not only of economic operators but also of contracting authorities. In addition, that interpretation also facilitates the involvement of small- and medium-sized undertakings in the contracts procurement market, an aim also pursued by Directive 2004/18, as stated in recital 32 thereof (see, to that effect, judgment of 10 October 2013, *Swm Costruzioni 2 and Mannocchi Luigino*, C-94/12, EU:C:2013:646, paragraph 34).

40 The interpretation set out in paragraph 38 above is not called into question by the Italian Government's argument that the 30% limit is justified in the light of the particular circumstances prevailing in Italy, where subcontracting has always been one of the mechanisms used to carry out criminal operations. According to the Italian Government, by limiting the share of the contract that can be subcontracted, the national legislation makes participation in public purchasing less attractive to criminal organisations, and this is capable of preventing the phenomenon of mafia infiltration in public purchasing and thus protecting public policy.

41 It is true, as is apparent, inter alia, from the qualitative selection criteria provided for in Directive 2004/18, in particular the exclusion grounds laid down in Article 45(1), that, by adopting such a provision, the EU legislature intended to prevent economic operators who have been the subject of a conviction by final judgment, for one or more of the reasons listed in that paragraph, from participating in a procurement procedure.

42 Similarly, recital 6 of Directive 2004/18 states that nothing in that directive should prevent the imposition or enforcement of measures necessary, inter alia, to protect public policy, public morality and public security, provided that those measures are in conformity with the EC treaty, while recital 43 of that directive states that public contracts should not be awarded, inter alia, to economic operators who have participated in a criminal organisation.

43 Furthermore, according to settled case-law, Member States must be recognised as having a certain discretion for the purpose of adopting measures intended to ensure compliance with the obligation of transparency, which is binding on contracting authorities in any procedure for the award of a public contract. Each Member State is best placed to identify, in the light of historical, legal, economic or social considerations specific to it, situations propitious to conduct liable to bring about breaches of that obligation (see, to that effect, judgment of 22 October 2015, *Impresa Edilux and SICEF*, C-425/14, EU:C:2015:721, paragraph 26 and the case-law cited).

44 More specifically, the Court has already held that combating the phenomenon of infiltration of the public procurement sector by organised crime constitutes a legitimate objective capable of justifying a restriction on the fundamental rules and general principles of the TFEU which apply in public procurement procedures (see, to that effect, judgment of 22 October 2015, *Impresa Edilux and SICEF*, C-425/14, EU:C:2015:721, paragraphs 27 and 28).

45 However, even assuming that a quantitative limit on the use of subcontracting may be regarded as capable of combating such a phenomenon, a restriction such as that at issue in the main proceedings goes beyond what is necessary to achieve that objective.

46 In that regard, it should be borne in mind that the contracting authorities must, throughout the procedure, observe the principles of procurement set out in recital 2 of Directive 2004/18, which include, inter alia, the principles of equal treatment, transparency and proportionality (see, to that effect, judgment of 23 December 2009, *Serrantoni and Consorzio stabile edili*, C-376/08, EU:C:2009:808, paragraph 23).

47 In particular, as stated in paragraph 38 above, the national legislation at issue in the main proceedings prohibits, in general, abstract terms, use of subcontracting for a share which exceeds a fixed percentage of the value of the public contract concerned, with the result that that prohibition applies regardless of

the economic sector concerned by the contract at issue, the nature of the works or the identity of the subcontractors. Furthermore, such a general prohibition does not allow for any assessment by the contracting authority on a case-by-case basis (see, by analogy, judgment of 26 September 2019, *Vitali*, C-63/18, EU:C:2019:787, paragraph 40 and the case-law cited).

48 It follows that, in the context of national legislation such as that at issue in the main proceedings, for all contracts, a significant part of the works, supplies or services concerned must be delivered by the tenderer himself, failing which he or she will be automatically excluded from the procurement procedure, including where the contracting entity is able to verify the identities of the subcontractors concerned and considers, after verification, that that limitation on the use of subcontracting is not necessary in order to combat organised crime under the contract in question (see, by analogy, judgment of 26 September 2019, *Vitali*, C-63/18, EU:C:2019:787, paragraph 41 and the case-law cited).

49 Less restrictive measures would be capable of achieving the objective pursued by the Italian legislature, such as an approach requiring the tenderer to provide the identities of any subcontractors at the tender stage so as to enable the contracting authority to carry out checks on proposed subcontractors, at least in the case of contracts considered to present an increased risk of infiltration by organised crime. Moreover, as appears from evidence submitted to the Court, Italian law already provides for numerous measures expressly intended to prohibit undertakings suspected of belonging to the mafia, or in any event of being linked to the interests of the main criminal organisations operating in the country, from having access to public tendering procedures.

50 Nor is the interpretation set out in paragraph 38 above called into question by the argument put forward by the Italian Government that the checks which the contracting authority is required to carry out under national law are ineffective. That circumstance, which, as seems clear from the Italian Government's own observations, results from the specific manner in which those checks are carried out, does not in any way alter the restrictive nature of the national measure at issue in the main proceedings. Moreover, in the present case the Italian Government has in no way demonstrated that rules such as those implied by the checks envisaged in the previous paragraph, combined with the application of the grounds for excluding subcontractors made possible by reason of Article 45 of Directive 2004/18, cannot be implemented in such a way as to achieve the objective pursued by the national legislation at issue in the main proceedings.

51 In the light of the foregoing considerations, the answer to the first part of the question referred for a preliminary ruling is that Directive 2004/18 must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which limits to 30% the share of the contract which the tenderer is permitted to subcontract to third parties.

The second part of the question

52 By the second part of its question, the referring court asks, in essence, whether Articles 49 and 56 TFEU, Directive 2004/18 and Directive 2014/24 must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which limits the possibility of reducing the prices applicable to subcontracted works, supplies or services by no more than 20% compared to the prices stated in the decision awarding the contract.

53 For the reasons set out in paragraphs 29 to 32 above, the second part of the question referred must also be answered in the light of Directive 2004/18 alone.

54 In that respect, it should be borne in mind, as stated in paragraph 36 above, that Directive 2004/18 allows tenderers to use subcontracting to perform a public contract.

55 In the present case, the national legislation at issue in the main proceedings imposes a limit, for all contracts, on the prices which may be paid when subcontractors are engaged to provide works, supplies or services covered by a public contract, whereby reductions of more than 20% compared to the prices stated in the decision awarding the contract are not allowed in respect of those works, supplies or services ('the 20% limit').

56 At the hearing, the European Commission explained that the position which it had put forward in its written observations to the Court, to the effect that the 20% limit could be regarded as compatible with the freedom to provide services and freedom of establishment, was based on its understanding that the findings of the referring court indicated that that limit enabled a case-by-case assessment to be made as to whether its application is in fact necessary to prevent social dumping.

57 In that regard, it is settled case-law that the Court must take into account, under the division of jurisdiction between the Courts of the European Union and the national courts, the factual and legal context, as set out in the order for reference, of the questions referred for a preliminary ruling. Consequently, irrespective of how the Commission may have understood the national legislation, the present reference for a preliminary ruling must be considered in the light of the referring court's interpretation of that law (see, by analogy, judgment of 29 October 2009, *Pontin*, C-63/08, EU:C:2009:666, paragraph 38 and the case-law cited).

58 It is apparent from the request for a preliminary ruling that compliance with the 20% limit is mandatory, failing which the tenderer will be excluded from the procurement procedure. It also follows from that request that the limit is defined in general, abstract terms, irrespective of any assessment of whether that limit is in fact necessary, in the case of a given contract, in order to guarantee minimum wage protection to the subcontracted workers concerned. That same limit thus applies whatever the economic sector or the activity concerned and regardless of any consideration of national or EU legislation, regulations, or collective agreements in force as regards working conditions, which would normally be applicable to such workers.

59 It follows that the 20% limit is liable to render less attractive the option offered by Directive 2004/18 of using subcontractors to perform a contract, since that national provision limits any competitive advantage in terms of cost which subcontracted workers present to undertakings seeking to avail themselves of that possibility. Such a disincentive runs counter to the objective, pursued by the relevant directives and referred to in paragraph 39 above, of opening up public contracts to the broadest possible competition and, in particular, enabling small and medium-sized undertakings to access public procurement procedures.

60 None of the objectives relied on before the Court in the present case warrants a restriction on the use of subcontracting such as the 20% limit.

61 In the first place, it is true that the objective of protecting subcontracted workers may, in principle, justify certain restrictions on the use of subcontracting (see, to that effect, judgment of 18 September 2014, *Bundesdruckerei*, C-549/13, EU:C:2014:2235, paragraph 31).

62 It is also true that Article 26 of Directive 2004/18 expressly permits contracting authorities to lay down special conditions for the performance of a contract, which may, in particular, concern social considerations.

63 However, even assuming that the requirements in terms of price laid down by the national legislation could be classified as 'special conditions relating to the performance of a contract', and in particular as 'social … considerations', which are 'indicated in the contract notice or in the specifications', within the meaning of Article 26 of Directive 2004/18, the fact remains that, in accordance with the latter

provision, such requirements may be imposed only to the extent to which they are compatible with EU law (see, by analogy, judgment of 18 September 2014, *Bundesdruckerei*, C-549/13, EU:C:2014:2235, paragraph 28).

64 However, national legislation such as that described in paragraphs 55, 58 and 59 above cannot be regarded as conferring protection on workers which is capable of justifying a restriction on the use of subcontracting such as the 20% limit.

65 Such a limitation goes beyond what is necessary to ensure pay protection for subcontracted workers. As has been noted in paragraphs 55 and 58 above, the 20% limit does not leave room for an assessment on a case-by-case basis by the contracting authority and applies irrespective of any consideration of the social protection guaranteed by the laws, regulations and collective agreements applicable to the workers concerned.

66 In that regard, as appears from the evidence before the Court, Italian law provides that the subcontractor is, like the successful tenderer, required to comply fully, in respect of his or her employees, when providing the subcontracted works, supplies or services, with the economic and regulatory treatment established by national, regional and local collective agreements in force in the sector and geographic area in which the works, supplies or services are delivered. According to that evidence, the successful tenderer is, moreover, jointly and severally liable for compliance by the subcontractor with those agreements.

67 The evidence submitted to the Court also shows that, in the present case, the subcontracting in question involves the use of social cooperatives which, under the Italian legislation on such cooperatives, benefit from preferential rules in terms of taxation, contributions, remuneration and social security and that that legislation specifically aims to facilitate the integration into the labour market of certain disadvantaged persons by making it possible to pay them lower wages than prescribed for other persons doing similar work. It is, however, for the referring court to carry out the necessary checks in that regard.

68 In the second place, a restriction on the use of subcontracting such as the 20% limit also cannot be justified by the objective of ensuring the viability of the tender and the due performance of the contract.

69 Admittedly, it cannot be excluded that such an objective may justify certain restrictions on subcontracting (see, to that effect, judgment of 5 April 2017, *Borta*, C-298/15, EU:C:2017:266, paragraph 54 and the case-law cited).

70 However, even if the 20% limit were appropriate for the purpose of achieving that objective, such a general, abstract restriction is, in any event, disproportionate to the objective pursued, since there are other, less restrictive measures which would facilitate its attainment. These could include, in particular, a measure requiring tenderers to indicate in their tenders the share of the contract and the works they intend to subcontract and the identity of the proposed subcontractors and allowing the contracting entity to prohibit tenderers from changing subcontractors if that entity has not been able to verify beforehand the identity, capacity and reliability of the proposed new subcontractors (see, by analogy, judgment of 5 April 2017, *Borta*, C-298/15, EU:C:2017:266, paragraph 57).

71 It should also be pointed out that, in the present case, it is apparent from the evidence submitted to the Court that measures already exist in Italian law – which it is for the national court to verify – some of which overlap at least in part with the measure described in the previous paragraph and which are intended to enable the contracting authority to verify the subcontractor's capacity and reliability before he or she provides the subcontracted supplies, works or services.

72 The application of the provisions of Article 55 of Directive 2004/18, concerning the verification of tenders which are abnormally low in relation to the works, supplies or services, which make it possible, for a given contract and under the conditions laid down in that respect, for the contracting authority to reject tenders so classified could also contribute to achieving the objective set out in paragraph 68 above.

73 In the third place, the Commission's argument that the 20% limit is justified in the light of the principle of equal treatment of economic operators cannot be considered to establish that that limit complies with EU law. According to the Commission, paying reduced prices to subcontractors without altering the main contractor's remuneration indicated in the tender would result in a substantial reduction in costs for the tenderer and would thus increase his or her profit from the contract.

74 In that respect, it suffices to note that the mere fact that a tenderer is able to limit his or her costs because of the prices he or she negotiates with subcontractors is not in itself liable to infringe the principle of equal treatment, but rather contributes to increased competition and thus to the objective pursued by the directives adopted in the area of public procurement, as recalled in paragraph 39 above.

75 In the light of the foregoing considerations, the answer to the second part of the question referred is that Directive 2004/18 must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which limits the possibility of reducing the prices applicable to the subcontracted works, supplies or services by no more than 20% compared to the prices specified in the decision awarding the contract.

Costs

76 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 (Fifth Chamber) hereby rules:

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 limits to 30% the share of the contract which the tenderer is permitted to subcontract to third parties;**

– **precluding national legislation, such as that at issue in the main proceedings, which limits the possibility of reducing the prices applicable to subcontracted works, supplies or services by no more than 20% compared to the prices stated in the decision to award the contract.**

[Signatures]