



Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

13 December 2012 *

(Directive 2004/18/EC — Article 45(2), first subparagraph, point (d) — Directive 2004/17/EC — Articles 53(3) and 54(4) — Public procurement — Postal services sector — Exclusion criteria in relation to the procedure for the award of a contract — Grave professional misconduct — Protection of the public interest — Maintenance of fair competition)

In Case C-465/11,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Krajowa Izba Odwoławcza (Poland), made by decision of 30 August 2011, received at the Court on 9 September 2011, in the proceedings

Forposta SA,

ABC Direct Contact sp. z o.o.

v

Poczta Polska SA,

THE COURT (Third Chamber),

composed of K. Lenaerts, acting as President of the Third Chamber, E. Juhász (Rapporteur), G. Arestis, J. Malenovský and T. von Danwitz, Judges,

Advocate General: J. Mazák,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure and further to the hearing on 26 September 2012,

after considering the observations submitted on behalf of:

- Forposta SA and ABC Direct Contact sp. z o.o., by P. Gruszczyński and A. Starczewska-Galos, radcy prawni,
- Poczta Polska SA, by P. Burzyński and H. Kornacki, radcy prawni,
- the Polish Government, by M. Szpunar and B. Majczyna and by M. Laszuk and E. Gromnicka, acting as Agents,
- the Italian Government, by G. Palmieri, acting as Agent, assisted by S. Varone, avvocato dello Stato,

* Language of the case: Polish.

— the European Commission, by K. Herrmann and A. Tokár, acting as Agents,
having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,
gives the following

Judgment

- 1 This reference for a preliminary ruling relates to the interpretation of 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), read in conjunction with Articles 53(3) and 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).
- 2 This reference has been made in the course of proceedings between, on the one hand, Forposta SA, formerly Praxis sp. z o.o., and ABC Direct Contact sp. z o.o. and, on the other, Poczta Polska SA ('Poczta Polska') concerning a decision of Poczta Polska to exclude Forposta SA and ABC Direct Contact sp. z o.o from the procedure for the award of a contract, for which the Poczta Polska issued a call for tender.

Legal context

European Union law

- 3 Section 2 of Chapter VII of Directive 2004/18, dealing with the 'Criteria for qualitative selection', contains Article 45, entitled 'Personal situation of the candidate or tenderer'. Paragraph 1 of that article sets out the criteria leading to the automatic exclusion of the candidate or tenderer from a contract, while paragraph 2 of the same article sets out the criteria which may lead to such exclusion. That latter paragraph reads as follows:

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

- (a) is bankrupt or is being wound up, where his affairs are being administered by the court, where he has entered into an arrangement with creditors, where he has suspended business activities or is in any analogous situation arising from a similar procedure under national laws and regulations;
- (b) is the subject of proceedings for a declaration of bankruptcy, for an order for compulsory winding up or administration by the court or of an arrangement with creditors or of any other similar proceedings under national laws and regulations;
- (c) has been convicted by a judgment which has the force of *res judicata* in accordance with the legal provisions of the country of any offence concerning his professional conduct;
- (d) has been guilty of grave professional misconduct proven by any means which the contracting authorities can demonstrate;
- (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;
- (g) is guilty of serious misrepresentation in supplying the information required under this Section or has not supplied such information.

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

- 4 Section 1 of Chapter VII of Directive 2004/17 is entitled 'Qualification and qualitative selection'. Article 53, which is part of that section, provides, under the heading 'Qualification systems':

'1. Contracting entities which so wish may establish and operate a system of qualification of economic operators.

Contracting entities which establish or operate a system of qualification shall ensure that economic operators are at all times able to request qualification.

...

3. The criteria and rules for qualification referred to in paragraph 2 may include the exclusion criteria listed in Article 45 of Directive 2004/18/EC on the terms and conditions set out therein.

Where the contracting entity is a contracting authority within the meaning of Article 2(1)(a), those criteria and rules shall include the exclusion criteria listed in Article 45(1) of Directive 2004/18/EC.

...'

- 5 Article 54 of Directive 2004/17, which is part of Section 1 and is entitled 'Criteria for qualitative selection', states in paragraphs 1 and 4:

'1. Contracting entities which establish selection criteria in an open procedure shall do so in accordance with objective rules and criteria which are available to interested economic operators.

...

4. The criteria set out in paragraphs 1 and 2 may include the exclusion criteria listed in Article 45 of Directive 2004/18/EC on the terms and conditions set out therein.

Where the contracting entity is a contracting authority within the meaning of Article 2(1)(a), the criteria and rules referred to in paragraphs 1 and 2 of this Article shall include the exclusion criteria listed in Article 45(1) of Directive 2004/18/EC.'

Polish law

- 6 The law of 29 January 2004 on public procurement (Dz. U. No 113, item 759, ‘the Law on public procurement’) lays down the principles and procedures for the award of public contracts and specifies the competent authorities. The amending law of 25 February 2011 (Dz. U. No 87, item 484), which came into force on 11 May 2011, inserted subparagraph (1a) under Article 24(1) of the Law on public procurement. That provision, as amended, reads as follows:

‘1. The following shall be excluded from procedures for the award of public contracts:

...

- (1a) economic operators with which the contracting authority concerned annulled, terminated, or renounced a public contract owing to circumstances for which the economic operator is responsible, where the annulment, termination or renouncement occurred in the three-year period before the procedure was initiated and the value of the non-performed part of the contract amounted to at least 5% of the contract’s value;

...’

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

- 7 Poczta Polska, a company belonging to the Polish Treasury, active in the postal services sector, is a contracting authority within the meaning of Directive 2004/17. Poczta Polska conducted an open procedure for the award of a public contract for ‘the delivery of postal packages, foreign and domestic, priority postal packages, cash-on-delivery items, and postal packages subject to special conditions’. According to the findings of fact in the reference for a preliminary ruling, the value of that contract exceeds the threshold above which European Union (‘EU’) public procurement rules are applicable.
- 8 Poczta Polska considered that the tenders made by Forposta SA and ABC Direct Contact sp. z o.o. were viewed as the most favourable in relation to certain tender lots and invited them to enter into a contract. That decision was not challenged by any of the participants to the procedure. However, on 21 July 2011, which was the deadline for the conclusion of the contract, Poczta Polska cancelled the tendering procedure on the grounds that the economic operators which had made the selected tenders were subject to compulsory exclusion from the procedure under Article 24(1)(1a) of the Law on public procurement.
- 9 The two companies concerned appealed that decision to the Krajowa Izba Odwoławcza (the Polish Public Procurement Office), claiming that that national provision was contrary to point (d) of the first subparagraph of Article 45(2) of Directive 2004/18. Specifically, in their view, the scope of the conditions laid down in that national provision was much broader than the condition laid down in EU law, which provides for only ‘grave professional misconduct’ as a ground for exclusion: such professional misconduct had not been committed in the case in the main proceedings.
- 10 The referring court observes that, at the time of the adoption of Article 24(1)(1a) of the Law on public procurement, the national legislature stated that it was based on point (d) of the first subparagraph of Article 45(2) of Directive 2004/18 and that court expresses doubts about whether that national provision conforms with the provision of EU law on which it is based, doubts which it regards as justified in light of the following considerations.

- 11 In the first place, the ground for exclusion laid down in that provision in Directive 2004/18 is grave professional misconduct, a concept which, in legal terms, refers more to the breach of principles relating to ethics, dignity and professional conscientiousness. Such a breach gives rise to professional liability on the part of the person who committed it through, inter alia, the opening of disciplinary proceedings by the competent professional bodies. Accordingly, it is those bodies or courts which would decide whether there has been grave professional misconduct and not the contracting authority, as provided for in the national provision at issue.
- 12 In the second place, the concept of circumstances ‘for which that operator is responsible’, reproduced in Article 24(1)(1a), of the Law on public procurement, is significantly broader than the concept of grave misconduct ‘committed by the operator’, set out in point (d) of the first subparagraph of Article 45(2) of Directive 2004/18, and, therefore, it ought not to be used in provisions which are intended to impose a sanction.
- 13 In the third place, given that point (d) of the first subparagraph of Article 45(2) of Directive 2004/18 requires that misconduct be grave, it is doubtful that the non-performance of 5% of a contract’s value could be qualified as grave misconduct. The referring court points out, in this regard, that when the conditions laid down in the national provision at issue in the main proceedings are fulfilled, the contracting authority is obliged to exclude the economic operator concerned and it cannot take into consideration that operator’s individual situation, which could result in a breach of the principle of proportionality.
- 14 The referring court notes, lastly, that, according to the case-law of the Court of Justice (Case C-213/07 *Michaniki* [2008] ECR I-9999 and Case C-376/08 *Serrantoni and Consorzio stabile edili* [2009] ECR I-12169), Directive 2004/18 does not preclude a Member State from providing grounds for exclusion other than those provided in Article 45(2) therein, and which are not based on objective considerations of the professional qualities of economic operators, to the extent that they are proportionate to the objective pursued. However, in accordance with the case-law of the Court (Joined Cases C-21/03 and C-34/03 *Fabricecom* [2005] ECR I-1559 and Joined Cases C-147/06 and C-148/06 *SECAP and Santorso* [2008] ECR I-3565), EU law precludes national rules which provide for the automatic exclusion of an operator from participation in a procedure for the award of a contract or the automatic rejection of tenders, and the application of measures which are disproportionate to the aim pursued. Not only does the national provision at issue apply automatically but, in addition, it goes beyond what is necessary to attain the aim of protecting the public interest, namely to eliminate contractors that are genuinely unreliable.
- 15 In the light of those considerations, the Krajowa Izba Odwoławcza decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:
 - ‘1. Can Article 45(2), [first subparagraph], point (d) of Directive 2004/18 ..., which states that any economic operator may be excluded from participation in a contract where that economic operator ... has been guilty of grave professional misconduct proven by any means which the contracting authorities can demonstrate, in conjunction with Articles 53(3) and 54(4) of Directive 2004/17 ..., be interpreted as meaning that it is possible to regard as grave professional misconduct a situation in which the contracting authority concerned annulled, terminated or renounced a public contract with the economic operator concerned owing to circumstances for which that operator is responsible, where the annulment, termination or renouncement occurred in the three-year period before the procedure was initiated and the value of the non-performed part of the contract amounted to at least 5% of the contract’s value?
 - 2 If Question 1 is answered in the negative – if a Member State is able to introduce grounds, other than those listed in Article 45 of Directive 2004/18 ..., for excluding economic operators from participation in a procedure for the award of a public contract, which it considers to be essential for the protection of the public interest, the legitimate interests of the contracting authorities and

the maintenance of fair competition between economic operators, is it possible to consider as consistent with that directive and the Treaty on the Functioning of the European Union a situation involving the exclusion of economic operators with which the contracting authority concerned annulled, terminated or renounced a public contract owing to circumstances for which that economic operator is responsible, where the annulment, termination or renouncement occurred in the three-year period before the procedure was initiated and the value of the non-performed part of the contract amounted to at least 5% of the contract's value?

The questions referred for a preliminary ruling

The jurisdiction of the Court

- 16 Poczta Polska claims that the Krajowa Izba Odwoławcza is not a court or tribunal within the meaning of Article 267 TFEU, given that it exercises both a judicial role and an advisory one.
- 17 On this point, it must be borne in mind that, according to settled case-law of the Court of Justice, in order to determine whether a body making a reference is a 'court or tribunal' within the meaning of Article 267 TFEU, which is a question governed by EU law alone, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter partes, whether it applies rules of law and whether it is independent (see Case C-54/96 *Dorsch Consult* [1997] ECR I-4961, paragraph 23, and Case C-443/09 *Grillo Star* [2012] ECR, paragraph 20 and case-law cited).
- 18 In the present case, it must be noted that, as is apparent from the documents before the Court, the Krajowa Izba Odwoławcza, which is a body established by the Law on public procurement, has been granted exclusive jurisdiction to hear and determine at first instance disputes between economic operators and competent authorities, and whose operation is governed by Articles 172 to 198 of that law, does constitute a court or tribunal, within the meaning of 267 TFEU, in the exercise of its jurisdiction in relation to those provisions, as is the case in the main proceedings. The fact that that body may be invested, by virtue of other provisions, with an advisory role is devoid of consequence in that regard.

Admissibility

- 19 The Polish Government submits that the reference for a preliminary ruling is inadmissible because it is hypothetical and because it aims, in essence, to determine whether national legislation at issue in the main principles is compatible with the provisions of Directive 2004/18, and not to obtain an interpretation of EU law in order to give guidance to the subject-matter of the dispute, which must be decided on the basis of national law. However, it is not for the Court of Justice, in proceedings for a preliminary ruling, to assess the compatibility of national law with EU law or interpret provisions of national law.
- 20 In that regard, it should be noted, first of all, that the referring court did not request the Court of Justice to assess the compatibility of the national legislation with EU law or to interpret that legislation. It merely requests the interpretation of EU public procurement rules for the purpose of assessing whether it is necessary to disapply, in the main proceedings, Article 24(1)(1a) of the Law of public procurement. Second, it must be noted that the questions referred are relevant for resolving that dispute, since Poczta Polska cancelled the tendering process of the contract at issue on the grounds that the economic operators which had put forward the tenders chosen were subject to compulsory exclusion from the procedure under that national provision.

- 21 In those circumstances, the reference for a preliminary ruling is admissible and the questions referred must be answered.

The first question

- 22 By that question, the referring court asks, in essence, whether point (d) of the first subparagraph of Article 45(2) of Directive 2004/18 is to be interpreted as precluding national legislation which provides that a situation of grave professional misconduct, which leads to the automatic exclusion of the economic operator at issue from a procedure for the award of a public contract in progress, arises where the contracting authority concerned has annulled, terminated or renounced a previous public contract with that same economic operator owing to circumstances for which that operator is responsible, where the annulment, termination or renouncement occurred in the three-year period before the procedure was initiated and the value of the non-performed part of the contract amounted to at least 5% of the contract's value.
- 23 In the light of the observations submitted by the Polish Government at the hearing before the Court, according to which a case such as that in the main proceedings, concerning the *rationae materiae* of Directive 2004/17, should be assessed under that directive alone, it should be pointed out that, according to the findings of the referring court, the national legislature itself indicated that, when it adopted Article 24(1)(1a) of the Law on public procurement, on the basis of which the companies concerned were excluded from the procedure for the award of a contract, it did so on the basis of point (d) of the first subparagraph of Article 45(2) of Directive 2004/18. Moreover Articles 53(3) and 54(4) of Directive 2004/17 explicitly refer to Article 45 of Directive 2004/18.
- 24 It is therefore evident that the Republic of Poland made use of the option provided in those provisions of Directive 2004/17 and incorporated, into its domestic legislation, the ground for exclusion provided for in point (d) of the first subparagraph of Article 45(2) of Directive 2004/18.
- 25 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.
- 26 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.
- 27 It must be observed, as the Polish Government rightly pointed out, that the concept of 'professional misconduct' covers all wrongful conduct which has an impact on the professional credibility of the operator at issue and not only the violations of ethical standards in the strict sense of the profession to which that operator belongs, which are established by the disciplinary body of that profession or by a judgment which has the force of *res judicata*.
- 28 Indeed, 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. In addition, unlike point (c) of that subparagraph, a judgment which has the force of *res judicata* is not required in order to prove professional misconduct, within the meaning of point (d) of that subparagraph.
- 29 Consequently, the failure of an economic operator to abide by its contractual obligations can, in principle, be considered as professional misconduct.

- 30 Nevertheless, 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. Accordingly, any incorrect, imprecise or defective performance of a contract or a part thereof could potentially demonstrate the limited professional competence of the economic operator at issue, but does not automatically amount to grave misconduct.
- 31 In addition, in order to find whether ‘grave misconduct’ exists, a specific and individual assessment of the conduct of the economic operator concerned must, in principle, be carried out.
- 32 However, the rules at issue in the main proceedings oblige the contracting authority to exclude an economic operator from the procedure for the award of a contract when, owing to circumstances for which the economic operator is responsible, the contracting authority has annulled or terminated a contract with that economic operator in the framework of a previous public contract.
- 33 In this regard, it is important to note that, given the specific characteristics of national legal systems as regards civil liability, the concept of ‘circumstances for which the economic operator is responsible’ is very broad and could extend to situations beyond conduct which denotes a wrongful intent or negligence of a certain gravity by the economic operator at issue. Yet, the first subparagraph of Article 54(4) of Directive 2004/17 refers to a power to apply the exclusion criteria listed in Article 45 of Directive 2004/18 ‘on the terms and conditions set out therein’, meaning that the concept of ‘grave misconduct’, as referred to in paragraph 25 above, cannot be replaced by the concept of ‘circumstances for which the economic operator concerned is responsible’.
- 34 Furthermore, the national legislation at issue in the main proceedings itself establishes the parameters that require the contracting authority at issue to exclude an economic operator from a newly undertaken procedure for the award of a contract due to the previous conduct of that operator, without allowing the contracting authority the power to assess, on a case-by-case basis, the gravity of the allegedly wrongful conduct of that operator in the performance of the previous contract.
- 35 Consequently, it is clear that the national rules at issue in the main proceedings do not merely follow the general framework for applying point (d) of the first subparagraph of Article 45(2) of Directive 2004/18, but impose on the contracting authorities mandatory requirements and conclusions to be automatically drawn in certain circumstances, thus exceeding the discretion enjoyed by the Member States, pursuant to the second subparagraph of Article 45(2) of that directive, in specifying the implementing conditions for the ground for exclusion set out in point (d) of the first subparagraph of Article 45(2) with regard for EU law.
- 36 In the light of all the foregoing considerations, the answer to the first question is that point (d) of the first subparagraph of Article 45(2) of Directive 2004/18 must be interpreted as precluding national legislation which provides that a situation of grave professional misconduct, which leads to the automatic exclusion of the economic operator at issue from a procedure for the award of a public contract in progress, arises where the contracting authority concerned has annulled, terminated or renounced a public contract with that same economic operator owing to circumstances for which that operator is responsible, where the annulment, termination or renouncement occurred in the three-year period before the procedure was initiated and the value of the non-performed part of the contract amounted to at least 5% of the contract’s value.

The second question

- 37 In essence, that question, raised in case the answer to the first question is in the negative, asks whether the principles and rules of EU public procurement law allow, on the grounds of the protection of the public interest, the legitimate interests of the contracting authorities or the maintenance of fair competition between economic operators, national legislation, such as that at issue in the main

proceedings, requiring the contracting authorities to automatically exclude an economic operator from a procedure for the award of a public contract in a situation such as that referred to in the first question.

- 38 While it is indeed apparent from Article 54(4) of Directive 2004/17 that the contracting powers can lay down criteria for qualitative selection in addition to the grounds for exclusion set out in Article 45 of Directive 2004/18, the fact remains that, in accordance with settled case-law of the Court, Article 45(2) of Directive 2004/18 exhaustively lists the grounds capable of justifying the exclusion of a contractor from participation in a contract for reasons, based on objective factors, that relate to his professional qualities and therefore precludes Member States from adding to the list contained in that provision other grounds for exclusion based on criteria relating to professional qualities (see Joined Cases C-226/04 and C-228/04 *La Cascina and Others* [2006] ECR I-1347, paragraph 22; *Michaniki*, paragraph 43; and Case C-74/09 *Bâtiments et Ponts Construction and WISAG Produktionservice*, [2010] ECR I-7271, paragraph 43).
- 39 It is only when the grounds for exclusion concerned do not relate to the professional qualities of economic operators, and, therefore, do not fall within that exhaustive list that it is possible to consider whether those grounds may be permissible under the principles or other rules of EU public procurement law (see, to this effect, *Fabricom*, paragraphs 25 to 36; *Michaniki*, paragraphs 44 to 69; and Case C-538/07 *Assitur* [2009] ECR I-4219, paragraphs 21 to 33).
- 40 However, in the present case, Article 24(1)(1a) of the Law on public procurement sets out a ground for exclusion relating to the professional quality of the economic operator concerned, as is borne out by the fact, pointed out in paragraphs 10 and 23 above, that the Polish legislature relied on point (d) of the first subparagraph of Article 45(2) of Directive 2004/18 in support the adoption of that national provision. Such a ground for exclusion, which goes beyond the scope of the exhaustive list in that first subparagraph, as is apparent from the response to the first question, is not, therefore, permissible under the principles or other rules of EU public procurement law.
- 41 Consequently, the answer to the second question is that the principles or rules of EU public procurement law do not allow, on the grounds of the protection of the public interest, the legitimate interests of the contracting authorities or the maintenance of fair competition between economic operators, national legislation, such as that at issue in the main proceedings, requiring the contracting authorities to automatically exclude an economic operator from a procedure for the award of a public contract in a situation such as that referred to in the reply to the first question referred for a preliminary ruling.

The temporal effects of the present judgment

- 42 The Polish Government asked the Court, at the hearing, to limit the temporal effects of the present judgment in the event that the Court interpreted point (d) of the first subparagraph of Article 45(2) of Directive 2004/18 as precluding national legislation of the kind at issue in the main proceedings.
- 43 In support of its application, the Polish Government relies on the alleged lack of clarity of that provision of EU law, not yet interpreted by the Court, as well as the risk of serious economic repercussions at national level that such an interpretation would entail.
- 44 In this regard, it should be borne in mind that the interpretation which, in the exercise of the jurisdiction conferred on it by Article 267 TFEU, the Court gives to a rule of EU law clarifies and defines the meaning and scope of that rule as it must be or ought to have been understood and applied from the time of its entry into force and it is only quite exceptionally that the Court may, in application of the general principle of legal certainty inherent in the EU legal order, be moved to restrict for any person concerned the opportunity of relying on a provision which it has interpreted

with a view to calling into question legal relationships established in good faith (see, inter alia, Joined Cases C-338/11 to C-347/11 *Santander Asset Management SGIIC and Others* [2012] ECR, paragraphs 58 and 59, and Case C-525/11 *Mednis* [2012] ECR, paragraphs 41 and 42).

- 45 More specifically, the Court has taken that step only in quite specific circumstances, where there was a risk of serious economic repercussions owing in particular to the large number of legal relationships entered into in good faith on the basis of rules considered to be validly in force and where it appeared that individuals and national authorities had been led to adopt practices which did not comply with EU law by reason of objective, significant uncertainty regarding the implications of EU provisions, to which the conduct of other Member States or the European Commission may even have contributed (see, inter alia, *Santander Asset Management SGIIC and Others*, paragraph 60, and *Mednis*, paragraph 43).
- 46 The alleged existence of significant objective uncertainty regarding the implications of the relevant provisions of EU law cannot be accepted in the case in the main proceedings. First, the situation of ‘grave professional misconduct’ within the meaning of point (d) of the first subparagraph of Article 45(2) of Directive 2004/18 manifestly does not cover the ground for exclusion laid down by Article 24(1)(1a) of the Law on public procurement. Second, it is apparent from the case-law, which was well established at the moment of the adoption of the national provision at issue in the main proceedings, that such a ground for exclusion could not be justified by reference to the principles or other rules of EU public procurement law.
- 47 As regards the financial consequences which might ensue for a Member State in the context of a reference for a preliminary ruling, they do not in themselves justify limiting the temporal effects of the ruling (*Santander Asset Management SGIIC and Others*, paragraph 62, and *Mednis*, paragraph 44).
- 48 It must be noted that, in any event, the Polish Government has not provided any factual evidence allowing the Court to assess whether there exists, as a result of this judgment, a risk of serious economic repercussions for the Republic of Poland.
- 49 Accordingly, there is no need to limit the temporal effects of the present judgment.

Costs

- 50 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. **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 which provides that a situation of grave professional misconduct, which leads to the automatic exclusion of the economic operator at issue from a procedure for the award of a public contract in progress, arises where the contracting authority concerned has annulled, terminated or renounced a public contract with that same economic operator owing to circumstances for which that operator is responsible, where the annulment, termination or renouncement occurred in the three-year period before the procedure was initiated and the value of the non-performed part of the contract amounted to at least 5% of the contract’s value.**

2. **The principles or rules of European Union public procurement law does not allow, on the grounds of the protection of the public interest, the legitimate interests of the contracting authorities or the maintenance of fair competition between economic operators, national legislation, such as that at issue in the main proceedings, requiring the contracting authorities to automatically exclude an economic operator from a procedure for the award of a public contract in a situation such as that referred to in the reply to the first question referred for a preliminary ruling.**

[Signatures]