



Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

12 September 2013*

(Public procurement — Directive 2004/18/EC — Article 1(9), second subparagraph, point (c) — Concept of ‘body governed by public law’ — Condition relating to the financing of the activity, or to management supervision, or to supervision of the activity by the State, by regional or local authorities or other bodies governed by public law — Association of medical practitioners — Financing provided for by law by means of contributions paid by the members of that association — Amount of the contributions fixed by the assembly of that association — Independence of that association in determining the scope and the rules for the performance of its statutory duties)

In Case C-526/11,

REQUEST for a preliminary ruling under Article 267 TFEU, from the Oberlandesgericht Düsseldorf (Germany), made by decision of 5 October 2011, received at the Court on 18 October 2011, in the proceedings

IVD GmbH & Co. KG

v

Ärzttekammer Westfalen-Lippe,

intervening party:

WWF Druck + Medien GmbH,

THE COURT (Fifth Chamber),

composed of T. von Danwitz, President of the Chamber, A. Rosas, E. Juhász, D. Šváby (Rapporteur) and C. Vajda, Judges,

Advocate General: P. Mengozzi,

Registrar: A. Impellizzeri, Administrator,

having regard to the written procedure and further to the hearing on 8 November 2012,

after considering the observations submitted on behalf of:

— IVD GmbH & Co. KG, by J. Eggers, Rechtsanwalt,

— the Ärztekammer Westfalen-Lippe, by S. Gesterkamp and T. Schneider-Lasogga, Rechtsanwälte,

* Language of the case: German.

— the Czech Government, by M. Smolek and T. Müller, acting as Agents,
— the European Commission, by M. Noll-Ehlers, A. Tokár and C. Zadra, acting as Agents,
after hearing the Opinion of the Advocate General at the sitting on 30 January 2013,
gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 1(9), second subparagraph, point (c) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114; ‘the Directive’).
- 2 The reference has been made in proceedings between IVD GmbH & Co. KG (‘IVD’) and the Ärztekammer Westfalen-Lippe (the Medical Association of Westphalia-Lippe, ‘the Ärztekammer’), concerning the latter’s decision to award a contract to another undertaking following a call for tenders.

Legal context

Union law

- 3 Under the second and third subparagraphs of Article 1(9) of Directive 2004/18:
‘A “body governed by public law” means any body:
(a) established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and
(b) having legal personality, and
(c) financed, for the most part, by the State, regional or local authorities, or other bodies governed by public law; or subject to management supervision by those bodies; or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law.

Non-exhaustive lists of bodies and categories of bodies governed by public law which fulfil the criteria referred to in (a), (b) and (c) of the second subparagraph are set out in Annex III.’

- 4 With regard to the Federal Republic of Germany, that annex mentions professional associations, in particular, associations representing medical practitioners, among the authorities, establishments and foundations created by Federal, State or local authorities.

German law

- 5 Under Paragraph 6(1)(1) to (5) of the Law on health professions of the Land of North Rhine-Westphalia (Heilberufsgesetz des Landes Nordrhein-Westfalen, ‘the HeilBerG NRW’), the tasks of the Ärztekammer are, in particular:
1. to support the public health and public veterinary services in the performance of their tasks, and especially to draw up proposals for all questions concerning medicine and the health professions;
 2. to give opinions at the supervisory authority’s request, and also to produce experts’ reports and to nominate experts at the competent authorities’ request;
 3. to guarantee an emergency medical and dental service outside consultation hours, to publicise it and to lay down the rules regulating its organisation;
 4. to promote and carry out the continuing professional training of members of the association, in order to help ensure that the knowledge, skills and abilities necessary to the practice of their profession correspond throughout their whole working life to the latest state of practice and science, to make rules concerning continuing education in accordance with [this] law and to issue certificates relating to specialities;
 5. to promote and carry out measures concerning the quality of health and veterinary services, in particular to establish certifications, in agreement with the interested parties.’
- 6 It is apparent from the order for reference and from the file before the Court that that law:
- also entrusts to the Ärztekammer, among others, the tasks of working to maintain the profession at a high level, of protecting the professional interests of its members, of watching over good relations between them, of setting up welfare associations for its members and their families, and of informing the public about its activities and topics related to the profession (Paragraph 6(1)(6) to (8), (10) and (12);
 - awards membership of that association to all medical practitioners practising their profession in the Land of North Rhine-Westphalia or having a permanent place of residence there (Paragraph 2);
 - in principle, confers the right to vote in the general assembly of that association on all its members (Paragraph 12(1));
 - provides for the right for the Ärztekammer to raise contributions from its members in order to perform its tasks (Paragraph 6(4), first sentence);
 - provides that the amount of those contributions must be fixed by a regulation adopted by the general assembly of that association (Paragraph 23(1));
 - makes the regulation subject to the approval of a supervisory authority (Paragraph 23(2)), that approval being intended only to ensure that the association’s budget is balanced; and
 - provides that the supervisory body is to carry out, *ex post facto*, a general review in order to establish whether the manner in which the Ärztekammer carries out its tasks is compatible with the legislation (Paragraph 28(1)).

The dispute in the main proceedings and the question referred

- 7 The Ärztekammer launched an invitation to tender for the printing and distribution of its newsletter and for the placing of advertising and the sale of subscriptions, a contract notice having been published in the *Official Journal of the European Union* on 5 November 2010. After two other tenderers had been rejected, the choice was made between IVD and WWF Druck + Meien GmbH, and in the end the latter's tender was accepted.
- 8 IVD challenged that award by way of a complaint, then by an action before the Vergabekammer, the competent administrative body for hearing and determining disputes concerning public contracts, claiming that the successful tenderer had not submitted certain references required by the Ärztekammer. Its action was dismissed by that body, its claims being declared to be unfounded.
- 9 Hearing an action against the decision of the Vergabekammer, the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf) decided of its own motion to consider whether the Ärztekammer had the status of a contracting authority, a question on which the admissibility of the action brought by IVD depends.
- 10 The referring court considers that the tasks entrusted to that association by Paragraph 6(1)(1) to (5) of the HeilBerG NRW are tasks in the general interest not of an industrial or commercial character. Furthermore, it is apparent from the file before the Court that that association has legal personality. Therefore, it satisfies the criteria laid down in Article 1(9), second subparagraph, points (a) and (b) of Directive 2004/18.
- 11 On the other hand, the referring court wonders whether the Ärztekammer's right to raise contributions from its members constitutes indirect State financing satisfying the first condition in Article 1(9), second subparagraph, point (c) of the directive.
- 12 According to the referring court, it follows from Case C-337/06 *Bayerischer Rundfunk and Others* [2007] ECR I-11173 and Case C-300/07 *Hans & Christophorus Oymanns* [2009] ECR I-4779, that such indirect State financing exists when the State either itself fixes the base and the amount of the contributions, or exercises such influence, by way of provisions setting out precisely those services that the legal person concerned must supply and controlling the determination of the amount of contributions, that that legal person has no more than narrow discretion in fixing that amount.
- 13 The referring court notes that the applicable law does not lay down the amount of contributions collected by the Ärztekammer and does not determine the extent of, or the means of implementing, the tasks assigned to that body in such a way that it may set the amount of contributions only within narrow limits. On the contrary, enjoying broad discretion regarding the performance of its tasks, the association has similar latitude in the determining of its financing needs and, therefore, in setting the amount of contributions due from its members. That court points out too that, although there is a system for approval by the supervisory authority of the regulation fixing that amount, that approval is intended only to ensure that the association's budget is balanced.
- 14 Having regard to those specific factors, the referring court takes the view that the characteristic features of the Ärztekammer do not match those set out by the Court in the judgments mentioned in paragraph 12 above, and is uncertain whether they are necessary in all cases in order for the condition relating to public financing to be satisfied.

- 15 In those circumstances, the Oberlandesgericht Düsseldorf decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘Is a body ... (here, a professional association) ... “financed, for the most part, by the State” or “subject to management supervision” by the State, within the meaning of point (c) of the second subparagraph of Article 1(9) of Directive 2004/18/EC:

- if that body is entitled by law to raise contributions from its members but does not fix the amount of those contributions or the scope of the services to be financed by them;
- but the fees regulation requires approval by the State?’

The question referred for a preliminary ruling

- 16 By its question, the referring court asks, essentially, whether point (c) of the second subparagraph of Article 1(9) of Directive 2004/18 must be interpreted as meaning that a body, such as a professional association governed by public law, satisfies either the criterion concerning financing for the most part by the public authorities, if that association is financed mainly by contributions paid by its members, the amount of which it is authorised to fix and collect by the law applicable, if that law does not determine the scope of, and the detailed rules governing, the actions undertaken by that body in carrying out its statutory tasks, which those contributions are intended to finance, or the criterion relating to management supervision by the public authorities, if the decision by which that body fixes the amount of those contributions must be approved by a supervisory authority.
- 17 It must at the outset be observed, as the referring court has done, that the Ärztekammer is mentioned in Annex III to Directive 2004/18, in which the bodies governed by public law referred to in Article 1(9), second subparagraph are identified for each Member State. In Part III of that annex, which concerns the Federal Republic of Germany, Category 1.1, relating to ‘Authorities, establishments and foundations governed by public law and created by Federal, State or local authorities’ mentions in its second indent, as regards the subcategory ‘professional associations’, inter alia ‘professional associations representing ... medical practitioners’.
- 18 However, as the Advocate General observed in points 20 and 21 of his Opinion, the inclusion of a given body in that annex is only the application of the substantive rule laid down in Article 1(9), second subparagraph of Directive 2004/18, which does not give rise to an irrebuttable presumption that that body is a ‘body governed by public law’ within the meaning of that provision. Therefore, it is for the judicature of the European Union, when hearing a request reasoned to that effect by the national court, to satisfy itself that the directive is internally consistent by verifying whether the inclusion of a given body in the annex constitutes a correct application of the substantive criteria (see, to that effect, *Hans & Christophorus Oymanns*, paragraphs 42, 43 and 45).
- 19 In that connection, in accordance with Article 1(9), second subparagraph of Directive 2004/18, a body is a ‘body governed by public law’ within the meaning of that provision and is subject, on that basis, to the provisions of that directive when three cumulative conditions are satisfied, namely: that body was established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character (point (a)); it has legal personality (point b) and it is financed, for the most part, by public authorities or it is subject to management supervision by the latter or it has an administrative, managerial or supervisory board, more than half of whose members are appointed by the public authorities (point (c)).
- 20 The three alternative criteria laid down in point (c) of the second subparagraph of Article 1(9) of the directive all reflect close dependence vis-à-vis the public authorities. That dependence is likely to enable the latter to influence the decisions of the body concerned with respect to public contracts,

which might lead to considerations other than economic ones guiding those decisions, and, in particular, to the risk that preference might be given to national tenderers or applicants, which would create barriers to the free movement of goods and services that the application of the directives on public procurement specifically seek to prevent (see, as regards similar provisions before Directive 2004/18, Case C-237/99 *Commission v France* [2001] ECR I-939, paragraphs 39, 41, 42, 44, 48 and the case-law cited).

- 21 In the light of those objectives, each of those criteria must be interpreted in functional terms (see, as regards similar provisions before Directive 2004/18 *Commission v France*, paragraph 43 and the case-law cited, and *Bayerischer Rundfunk and Others*, paragraph 40), that is to say, given an interpretation independent of the formal rules for its use (see, by analogy, Case C-360/96 *BFI Holding* [1998] ECR I-6821, paragraphs 62 and 63), and each criterion must be understood to create close dependence on the public authorities.
- 22 First of all, as regards the first criterion laid down in point (c) of the second subparagraph of Article 1(9) of Directive 2004/18 relating to financing for the most part by the public authorities, the concept of financing refers to a transfer of funds made without specific consideration with the aim of supporting the activities of the body concerned (see, as regards similar provisions before Directive 2004/18, Case C-380/98 *University of Cambridge* [2000] ECR I-8035, paragraph 21).
- 23 Since that concept must be interpreted in functional terms, the Court has held that the criterion relating to majority financing by the public authorities includes a method of indirect financing.
- 24 Such financing may be made by means of a fee provided for and imposed by statute as regards its principle and amount, and which does not constitute consideration for actual use of services provided by the body concerned by the persons liable to pay the fee and in respect of which the detailed rules for collection derive from the powers of a public authority (see, to that effect, *Bayerischer Rundfunk and Others*, paragraphs 41, 42, 44, 45 and 47 to 49).
- 25 The fact that, formally, a body itself fixes the amount of contributions which provide for the greater part of its financing does not make it impossible that indirect financing could satisfy that criterion. That is the case when bodies such as statutory sickness insurance funds are financed by contributions paid by or for their members without specific consideration, when membership of such a fund and the payment of those contributions are required by law, and when the amount of those contributions, although formally fixed by the funds themselves, is, on the one hand, laid down by statute, the law determining the services provided by those funds and the associated expenses and prohibiting them from operating on a profit-making basis, and must, on the other, be authorised by the supervisory authority, and when contributions are compulsorily recovered on the basis of the provisions of public law (see, to that effect, *Hans & Christophorus Oymanns*, paragraphs 53 to 56).
- 26 It must, however, be held that the situation of a body such as the Ärztekammer cannot be treated like that described in the preceding paragraph of this judgment.
- 27 Although the tasks of that body are set out in the HeilBerG NRW, it is nevertheless clear from the order for reference that a notable feature of its situation is the considerable degree of autonomy left to it by that law to determine the nature and scope of, and the procedures for, the actions it undertakes in order to perform its tasks and to set the budget necessary to that end and, consequently, the amount of contributions that it will claim from its members. The fact that the regulation fixing that amount must be approved by a supervisory public authority is not decisive when that authority merely ascertains that the budget of the body concerned is balanced, that is to say, that the body is, by means of contributions from its members and from its other resources, sure of enough revenue to cover all the costs relating to its functioning according to the rules that it has itself adopted.

- 28 Furthermore, as the Advocate General observed, in points 65 and 66 of his Opinion, that independence in relation to the public authorities is further strengthened in the present case by the fact that that regulation is adopted by an assembly constituted by the contributors themselves.
- 29 Next, as regards the second criterion laid down in point (c) of the second subparagraph of Article 1(9) of Directive 2004/18, relating to management supervision by the public authorities, it must be recalled that, in principle, a review *ex post facto* does not satisfy that criterion, for such a review does not enable the public authorities to influence the decisions of the body in question in relation to public contracts (see, to that effect, Case C-373/00 *Adolf Truley* [2003] ECR I-1931, paragraph 70). That is the case, in principle, of a general review of legality conducted *ex post facto* by a supervisory authority and, *a fortiori*, of an action taken by that authority in the form of approval of the body's decision fixing the amount of contributions which provide for the greater part of its financing, which is confined to ascertaining that the body's budget is balanced.
- 30 It appears therefore that, although the law determines its tasks and the manner in which the greater part of its financing must be organised, and provides that the decision by which it fixes the amount of the contributions payable by its members must be approved by a supervisory authority, a body such as the *Ärzttekammer* has in fact organisational and budgetary independence which precludes its being considered to be in a state closely dependent on the public authorities. Therefore, the means of financing of such a body do not constitute financing for the most part by the public authorities and do not allow management supervision of that body by the public authorities.
- 31 Having regard to all the foregoing considerations, the answer to the question referred is that, on a proper construction of point (c) of the second subparagraph of Article 1(9) of Directive 2004/18, a body such as a professional association governed by public law satisfies neither the criterion relating to financing for the most part by the public authorities when it is financed for the most part by contributions paid by its members, in respect of which it is authorised by law to fix and collect the amount, if that law does not determine the scope of, and procedures for, the actions undertaken by that body in the performance of its statutory tasks, which those contributions are intended to finance, nor the criterion relating to management supervision by the public authorities simply because the decision by which that body fixes the amount of those contributions must be approved by a supervisory authority.

Costs

- 32 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:

On a proper construction of point (c) of the second subparagraph of Article 1(9) 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, a body such as a professional association governed by public law satisfies neither the criterion relating to financing for the most part by the public authorities when that body is financed for the most part by contributions paid by its members, in respect of which it is authorised by law to fix and collect the amount, if that law does not determine the scope of, and procedures for, the actions undertaken by that body in the performance of its statutory tasks, which those contributions are intended to finance, nor the criterion relating to management supervision by the public authorities simply because the decision by which that body sets the amount of those contributions must be approved by a supervisory authority.

[Signatures]