



Reports of Cases

JUDGMENT OF THE COURT (Tenth Chamber)

18 December 2014*

(Reference for a preliminary ruling — Public procurement — Contracts falling below the threshold laid down in Directive 2004/18/EC — Articles 49 TFEU and 56 TFEU — Applicability — Certain cross-border interest — Grounds for exclusion from a tendering procedure — Exclusion of an economic operator having committed an infringement of national competition rules, established by a judgment given not more than five years ago — Lawfulness — Proportionality)

In Case C-470/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Fővárosi Közigazgatási és Munkaügyi Bíróság (Hungary), made by decision of 23 August 2013, received at the Court on 2 September 2013, in the proceedings

Generali-Providencia Biztosító Zrt

v

Közbeszerzési Hatóság Közbeszerzési Döntőbizottság,

THE COURT (Tenth Chamber),

composed of C. Vajda (Rapporteur), President of the Chamber, E. Juhász and D. Šváby, Judges,

Advocate General: M. Szpunar,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 25 September 2014,

after considering the observations submitted on behalf of:

- Generali-Providencia Biztosító Zrt, by G. Fejes and P. Tasi, ügyvédek,
- the Közbeszerzési Hatóság Közbeszerzési Döntőbizottság, by P. Csanádi, ügyvéd,
- the Hungarian Government, by Z. Fehér and K. Szíjjártó, acting as Agents,
- the Spanish Government, by J. García-Valdecasas Dorrego, acting as Agent,
- the European Commission, by A. Tokár and A. Sipos, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

* Language of the case: Hungarian.

gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Articles 18 TFEU, 34 TFEU, 49 TFEU and 56 TFEU, and of points (c) and (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), as amended by Commission Regulation (EC) No 1177/2009 of 30 November 2009 (OJ 2009 L 314, p. 64; ‘Directive 2004/18’).
- 2 The request has been made in proceedings between Generali-Providencia Biztosító Zrt (‘Generali’) and the Közbeszerzési Hatóság Közbeszerzési Döntőbizottság (board of appeal of the public procurement office), concerning the dismissal of that company’s action brought before the board of appeal against the decision to exclude Generali from a tendering procedure on the ground that it had previously committed an infringement of the national competition rules.

Legal context

European Union law

- 3 Recital 2 in the preamble to Directive 2004/18 states:

‘The award of contracts concluded in the Member States on behalf of the State, regional or local authorities and other bodies governed by public law entities, is subject to the respect of the principles of the Treaty and in particular to the principle of freedom of movement of goods, the principle of freedom of establishment and the principle of freedom to provide services and to the principles deriving therefrom, such as the principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality and the principle of transparency. ...’

- 4 Article 7(b) of Directive 2004/18 establishes, inter alia, for public supply and service contracts awarded by contracting authorities other than those listed in Annex IV to that directive, a threshold for the application of that directive of EUR 193 000.
- 5 Article 45 of that directive, headed ‘Personal situation of the candidate or tenderer’, provides in paragraph 2:

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

...

- (c) has been convicted by a judgment having 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;

...

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

- 6 Recital 101 in the preamble to Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65) reads as follows:

‘Contracting authorities should further be given the possibility to exclude economic operators which have proven unreliable, for instance because of violations of environmental or social obligations, including rules on accessibility for disabled persons or other forms of grave professional misconduct, such as violations of competition rules or of intellectual property rights. It should be clarified that grave professional misconduct can render an economic operator’s integrity questionable and thus render the economic operator unsuitable to receive the award of a public contract irrespective of whether the economic operator would otherwise have the technical and economical capacity to perform the contract.

...’

- 7 According to Article 57(4) of Directive 2014/24:

‘Contracting authorities may exclude or may be required by Member States to exclude from participation in a procurement procedure any economic operator in any of the following situations:

...

- (d) where the contracting authority has sufficiently plausible indications to conclude that the economic operator has entered into agreements with other economic operators aimed at distorting competition;

...’

Hungarian law

- 8 Paragraph 61(1) of Law CXXIX of 2003 on public procurement (közbeszerzésekről szóló 2003. évi CXXIX. törvény, Magyar Közlöny 2003/157, ‘the Kbt’) is drafted as follows:

‘The contracting authority may provide in the contract notice that no one may take part in the procedure, as a tenderer, subcontractor or ancillary supplier seeking to take on more than 10% of the value of the public contract, or as a subcontractor within the meaning of points (d) and (e), who:

- a) has committed an infringement connected with his commercial or professional activity, established by court judgment having the force of *res judicata* given not more than five years ago.

...’

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

- 9 By decision of 21 December 2006, the Gazdasági Versenyhivatal (competition authority) found that certain vertical agreements between Generali and a number of vehicle dealerships infringed national competition rules, and imposed a fine on that company. On appeal, the Fővárosi ítéltábla (Court of Appeal, Budapest) upheld that decision by a judgment classified as ‘jogerős’ (‘having the force of *res judicata*’). An appeal was brought against that judgment before the Magyar Köztársaság Legfelsőbb Bírósága (Supreme Court) which made a reference for a preliminary ruling to the Court, giving rise to the judgment in *Allianz Hungária Biztosító and Others* (C-32/11, EU:C:2013:160).

- 10 On 5 December 2011, the Nemzeti Adó- és Vámhivatal (national tax and customs authority) published a contract notice for the provision of insurance services. In that notice, among the grounds for exclusion from the tendering procedure connected with the tenderer's personal situation, the contracting authority referred to those set out in Paragraph 61(1)(a) to (c) and Paragraph 62(1) of the Kbt.
- 11 In reply to that notice, Generali submitted a tender within the time-limit allowed.
- 12 The contracting authority notified Generali of its decision to exclude it from the award procedure in question on the ground that Generali was caught by the cause for exclusion laid down in Paragraph 61(1)(a) of the Kbt, as a result of its infringement of the national competition rules which had been confirmed by a court ruling having the force of *res judicata*.
- 13 After its administrative action against the decision of the contracting authority had been dismissed, Generali brought an action before the Fővárosi Törvényszék (Budapest Municipal Court), whose administrative law cases were subsequently taken over by the Fővárosi Közigazgatási és Munkaügyi Bíróság (Administrative and Social Court, Budapest).
- 14 The referring court queries the compatibility with EU law of the ground for excluding Generali from that award procedure. It states that points (c) and (d) of the first subparagraph of Article 45(2) of Directive 2004/18 make it possible to exclude an economic operator from participating in a contract for reasons based on objective circumstances connected with the professional activity of that operator. Although it considers that point (c) of the first subparagraph of Article 45(2) of that directive does not apply in the circumstances of the case before it, since the infringement committed by Generali is not classified as an 'offence' under national law, the referring court asks whether point (d) of the first subparagraph of Article 45(2) of that directive could apply in the same circumstances.
- 15 The referring court considers that, in the light of the Court's interpretation of the concept of 'professional misconduct' in point (d), referred to above, in its judgment in *Forposta and ABC Direct Contact* (C-465/11, EU:C:2012:801), the practices with which an economic operator must comply, or from which it must refrain, in order to satisfy the requirements of business integrity have an impact on its professional credibility. Therefore, a practice which infringes the prohibition of agreements restricting competition and is duly established by a court judgment having the force of *res judicata* is covered by that concept. The seriousness of the misconduct must be assessed by reference to the specific conduct of the economic operator.
- 16 If, on the other hand, it is to be considered that such an infringement does not have an impact on the professional credibility of the economic operator or does not involve an infringement of the ethical standards of the profession to which he belongs, the referring court is of the opinion that that operator may not be excluded from participation in a contract as a result of an infringement of the national competition rules, on the basis of Article 45(2) of Directive 2004/18 which lists, exhaustively, the grounds capable of justifying the exclusion of such an operator for reasons relating to his professional qualities.
- 17 The referring court considers that such an interpretation would require it not to apply Paragraph 61(1)(a) of the Kbt, bearing in mind also the fact that, as is clear from recital 2 in the preamble to Directive 2004/18, the national public procurement rules must comply with the general rules and principles of EU law. In that regard, it states that the interpretation of Paragraph 61(1)(a) of the Kbt by the Közbiztosítási Hatóság Közbiztosítási Döntőbizottság is capable of impeding the exercise of the fundamental freedoms guaranteed by EU law, in that that provision does not specify either the characteristics or the seriousness of the infringement which the economic operator must have committed in relation to his commercial or professional activity, but provides that his exclusion from participation in a contract is the consequence of the mere fact that judicial proceedings relating to that infringement were conducted.

18 In those circumstances, the Fővárosi Közigazgatási és Munkaügyi Bíróság decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

- (1) May the Member States exclude an economic operator from participating in a procedure for the award of a public contract on grounds other than those listed in Article 45 of Directive [2004/18] (in particular, on grounds that are considered to be justified from the point of view of protecting the public interest, the legitimate interests of the contracting authority or fair competition and the maintenance of lawfulness in competition) and, if so, is the provision of such exclusion in relation to an economic operator who has committed an infringement connected with his commercial or professional activity which has been established by a court judgment with the force of *res judicata* given not more than five years ago compatible with recital 2 in the preamble to that directive and with Articles 18 TFEU, 34 TFEU, 49 TFEU and 56 TFEU?
- (2) If the Court of Justice should answer the first question in the negative, must the first subparagraph of Article 45(2) of Directive 2004/18, in particular points (c) and (d) of that provision, be interpreted to the effect that they authorise the exclusion from the procedure for the award of a public contract any economic operator who has committed an infringement established by an administrative or judicial authority in competition proceedings initiated on account of his commercial or professional activity, and who has had the penalties under competition law imposed on him as a result of that infringement?

Consideration of the questions referred

- 19 As a preliminary point, it is important to note that, as the referring court observes, although Paragraph 61(1)(a) of the Kbt might make it possible to exclude an economic operator from a tendering procedure for any infringement committed in connection with his commercial or professional activity, without giving any details of the nature or seriousness of that infringement, Generali was excluded from the procedure for awarding the contract in question in the case at issue in the main proceedings on the basis of that provision as a result of its infringement of national competition law, which was confirmed by a court ruling having the force of *res judicata*, and for which a fine was imposed on it.
- 20 Accordingly, by its questions, which it is appropriate to examine together, the national court asks in essence whether Articles 18 TFEU, 34 TFEU, 49 TFEU and 56 TFEU, and points (c) and (d) of the first subparagraph of Article 45(2) of Directive 2004/18 preclude the application of national legislation excluding the participation in a tendering procedure of an economic operator who has committed an infringement of competition law, established by a judicial decision having the force of *res judicata*, for which a fine was imposed.
- 21 In the first place, as regards the provisions of Directive 2004/18, cited in the questions referred for a preliminary ruling, both Generali, in response to a question from the Court at the hearing, and the Hungarian Government, in its written submissions, declared that the contract at issue in the main proceedings has a value lower than the threshold set out in the first indent of Article 7(b) of that directive, which, according to that Government, is the relevant threshold, given that the national tax and customs authority is not referred to in Annex IV to that directive. Consequently, subject to verification by the referring court, Directive 2004/18 does not apply to that contract.
- 22 At the hearing, Generali and the European Commission stated, however, that the Hungarian legislation transposing Directive 2004/18 applies both to contracts which attain the thresholds laid down in Article 7 of that directive and those which do not. In that context, they observed that the Court has held that it has jurisdiction to rule on requests for a preliminary ruling concerning provisions of an EU act in situations where the facts of the main proceedings were outside the scope of that act, but

where those provisions had been rendered applicable by domestic law by virtue of a reference made by that law to the content of those provisions (see, to that effect, judgments in *Dzodzi*, C-297/88 and C-197/89, EU:C:1990:360, paragraph 36, and *Nolan*, C-583/10, EU:C:2012:638, paragraph 45).

- 23 It is true that the Court has already held that the interpretation of provisions of an act of the Union in situations outside that act's scope is justified where those provisions have been made applicable to such situations by national law directly and unconditionally in order to ensure that internal situations and situations governed by EU law are treated in the same way (see, to that effect, judgment in *Nolan*, EU:C:2012:638, paragraph 47 and the case-law cited).
- 24 That is not, however, the case in the context of the dispute in the main proceedings.
- 25 It is not apparent either from the order for reference or from the file submitted to the Court that there is a provision of Hungarian law which makes Directive 2004/18 directly and unconditionally applicable to public contracts the value of which falls below the relevant threshold laid down in Article 7 of that directive.
- 26 It is clear from the foregoing that the Court does not need to provide the national court with an interpretation of the provisions of Directive 2004/18 mentioned in the preliminary questions in order for that national court to resolve the dispute in the main proceedings.
- 27 In the second place, in so far as the provisions of the TFEU relied on by the referring court are concerned, it must be observed that, where a public contract does not come within the scope of Directive 2004/18, because it falls short of the relevant threshold laid down in Article 7 of that directive, that contract is subject to the fundamental rules and general principles of that treaty, provided that it is of certain cross-border interest in the light, inter alia, of its value and the place where it is carried out (see, to that effect, judgments in *Ordine degli Ingegneri della Provincia di Lecce and Others*, C-159/11, EU:C:2012:817, paragraph 23, and *Consorzio Stabile Libor Lavori Pubblici*, C-358/12, EU:C:2014:2063, paragraph 24).
- 28 However, the referring court has not established the facts needed to enable this Court to verify whether, in the case at issue in the main proceedings, there is certain cross-border interest. As is clear from Article 94 of the Rules of Procedure of the Court, in the version which came into force on 1 November 2012, the Court must be able to find in the request for a preliminary ruling an account of the facts on which the questions are based and, in particular, the link between those facts and those questions. Accordingly, it is necessary to establish the facts needed to verify the existence of certain cross-border interest and, in general, make all the findings which the national courts are required to make, and on which the applicability of an act of EU secondary legislation and EU primary law depends, before any referral is made to the Court (see judgment in *Azienda sanitaria locale No 5 'Spezzino' and Others*, C-113/13, EU:C:2014:2440, paragraph 47).
- 29 In view of the spirit of judicial cooperation which governs relations between national courts and the Court of Justice in the context of preliminary ruling proceedings, the fact that the referring court did not make those initial findings relating to the possible existence of certain cross-border interest does not mean that the request is inadmissible if, in spite of those deficiencies, the Court, in the light of the information contained in the court file, considers that it is in a position to provide a useful answer to the referring court. That is particularly the case where the decision to refer contains sufficient relevant information for the assessment of the possible existence of such an interest. Nevertheless, the response provided by the Court takes effect only if it is possible for the referring court to establish certain cross-border interest in the case at issue in the main proceedings, on the basis of a detailed assessment of all the relevant facts in the case in the main proceedings (see judgment in *Azienda sanitaria locale No 5 'Spezzino' and Others*, EU:C:2014:2440, paragraph 48 and the case-law cited). It is subject to that proviso that the following considerations are set out.

- 30 As far as the provisions of the TFEU referred to in those questions are concerned, it is clear from the order for reference that the contract relates to the provision of insurance services. Accordingly, Article 34 TFEU, on the free movement of goods does not apply. However, Articles 49 TFEU and 56 TFEU, respectively, on freedom of establishment and the freedom to provide services must be regarded as relevant in the context of the main proceedings.
- 31 Since the latter provisions are specific applications of the general prohibition of discrimination on grounds of nationality laid down in Article 18 TFEU, there is no need to refer to Article 18 TFEU in order to answer the question (see, to that effect, judgment in *Wall*, C-91/08, EU:C:2010:182, paragraph 32 and the case-law cited).
- 32 Given that Articles 49 TFEU and 56 TFEU apply to a contract such as that at issue in the main proceedings, provided that that contract is of certain cross-border interest, the contracting authorities are required to abide by the prohibition on discrimination on the grounds of nationality and the obligation for transparency which arise under those articles (see, to that effect, judgment in *Wall*, EU:C:2010:182, paragraph 33 and the case-law cited).
- 33 There is nothing in the file submitted to the Court or in the observations presented by the interested persons referred to in Article 23 of the Statute of the Court of Justice of the European Union to suggest that the application of the cause for exclusion in Paragraph 61(1)(a) of the Kbt in a situation such as that at issue in the main proceedings might constitute even indirect discrimination on the grounds of nationality or infringe the obligation of transparency. In that regard, it must be noted that the contracting authority expressly stated in the contract notice that the cause for exclusion referred to in that provision of the Kbt applies to that contract.
- 34 In relation to the exclusion of economic operators from a public contract in the context of freedom of establishment and the freedom to provide services under Articles 49 TFEU and 56 TFEU, it must be observed that Article 45(2)(d) of Directive 2004/18 makes it possible to exclude any operator who ‘has been guilty of grave professional misconduct proven by any means which the contracting authorities can demonstrate’.
- 35 It must be observed that the concept of ‘professional misconduct’, for the purposes of that provision, covers all wrongful conduct which has an impact on the professional credibility of the operator at issue and not only the infringements of ethical standards in the strict sense of the profession to which that operator belongs (see, to that effect, judgment in *Forposta and ABC Direct Contact*, EU:C:2012:801, paragraph 27). In those circumstances, the commission of an infringement of the competition rules, in particular where that infringement was penalised by a fine, constitutes a cause for exclusion under Article 45(2)(d) of Directive 2004/18.
- 36 If such a cause for exclusion is possible under Directive 2004/18, it must *a fortiori* be regarded as justified in relation to public contracts which fall short of the threshold defined in Article 7 of that directive and which are consequently not subject to the strict special procedures laid down in that directive (see, to that effects, judgment in *Consorzio Stabile Libor Lavori Pubblici*, EU:C:2014:2063, paragraph 37).
- 37 Furthermore, recital 101 in the preamble to Directive 2014/24, adopted after the material time, which states that contracting authorities should be able to exclude economic operators, inter alia, for serious professional misconduct, such as infringement of the competition rules, as such misconduct may render an economic operator’s integrity questionable, shows that the cause for exclusion referred to in paragraph 35 above is considered to be justified in the light of EU law. Moreover, Article 57(4)(d) of that directive makes clear and precise provision for that cause for exclusion.

- 38 It must be added that, as it explained at the hearing, Generali does not dispute that it is open to Member States to make provision in their national legislation for a cause of exclusion from a public contract based on the fact that the economic operator concerned infringed competition rules. What it disputes is the scope of Paragraph 61(1)(a) of the Kbt which, in its opinion, constitutes a general cause for exclusion that goes far beyond the causes for exclusion in Article 45 of Directive 2004/18. As has been noted in paragraph 19 above, the main proceedings concern the exclusion of Generali from participating in the contract concerned on the grounds that it had committed an infringement of the competition rules for which it was fined. Accordingly, an examination of the compatibility with EU law of other causes for exclusion possibly covered by that provision of Hungarian legislation is not relevant for the purposes of resolving the dispute in the main proceedings.
- 39 In the light of the foregoing, the answer to the questions referred is that Articles 49 TFEU and 56 TFEU do not preclude the application of national legislation excluding the participation in a tendering procedure of an economic operator which has committed an infringement of competition law, established by a judicial decision having the force of *res judicata*, for which a fine was imposed.

Costs

- 40 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Tenth Chamber) hereby rules:

Articles 49 TFEU and 56 TFEU do not preclude the application of national legislation excluding the participation in a tendering procedure of an economic operator who has committed an infringement of competition law, established by a judicial decision having the force of *res judicata*, for which a fine was imposed.

[Signatures]