



Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

6 October 2015*

(Reference for a preliminary ruling — Article 267 TFEU — Jurisdiction of the Court — Status of the referring body as a court or tribunal — Independence — Compulsory jurisdiction — Directive 89/665/EEC — Article 2 — Bodies responsible for review procedures — Directive 2004/18/EC — Articles 1(8) and 52 — Public procurement procedures — Meaning of ‘public entity’ — Public authorities — Inclusion)

In Case C-203/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunal Català de Contractes del Sector Públic (Spain), made by decision of 25 March 2014, received at the Court on 23 April 2014, in the proceedings

Consorci Sanitari del Maresme

v

Corporació de Salut del Maresme i la Selva,

THE COURT (Grand Chamber),

composed of V. Skouris, President, K. Lenaerts, Vice-President, A. Tizzano, R. Silva de Lapuerta, T. von Danwitz, A. Ó Caoimh, J.-C. Bonichot, C. Vajda and S. Rodin, Presidents of Chambers, A. Arabadjiev, M. Berger (Rapporteur), E. Jarašiūnas, C.G. Fernlund, J.L. da Cruz Vilaça and F. Biltgen, Judges,

Advocate General: N. Jääskinen,

Registrar: L. Carrasco Marco, Administrator,

having regard to the written procedure and further to the hearing on 12 May 2015,

after considering the observations submitted on behalf of:

- the Spanish Government, by M. Sampol Pucurull, acting as Agent,
- the Italian Government, by G. Palmieri, acting as Agent, assisted by S. Varone, avvocato dello Stato,
- the European Commission, by A. Tokár and D. Loma-Osorio Lerena, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 7 July 2015,

* Language of the case: Spanish.

gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Articles 1(8) and 52 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).
- 2 The request has been made in proceedings between the Consorci Sanitari del Maresme (Maresme Health Consortium) and the Corporació de Salut del Maresme i la Selva (the Health Services Corporation for the districts of Maresme and la Selva) concerning a decision refusing to admit that consortium to a tendering procedure relating to nuclear magnetic resonance services for healthcare centres managed by the Corporació de Salut del Maresme i la Selva.

Legal context

EU law

- 3 Recital 4 in the preamble to Directive 2004/18 states:

‘Member States should ensure that the participation of a body governed by public law as a tenderer in a procedure for the award of a public contract does not cause any distortion of competition in relation to private tenderers.’

- 4 Article 1(8) of that directive provides as follows:

‘The terms “contractor”, “supplier” and “service provider” mean any natural or legal person or public entity or group of such persons and/or bodies which offers on the market, respectively, the execution of works and/or a work, products or services.

The term “economic operator” shall cover equally the concepts of contractor, supplier and service provider. It is used merely in the interest of simplification.

...’

- 5 Under Article 2 of Directive 2004/18, which is entitled ‘Principles of awarding contracts’:

‘Contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way.’

- 6 Article 52(1) of Directive 2004/18, which is entitled ‘Official lists of approved economic operators and certification by bodies established under public or private law’, provides:

‘1. Member States may introduce either official lists of approved contractors, suppliers or service providers or certification by certification bodies established [under] public or private law.

Member States shall adapt the conditions for registration on these lists and for the issue of certificates by certification bodies to the provisions of Article 45(1), Article 45(2)(a) to (d) and (g), Article 46, Article 47(1), (4) and (5), Article 48(1), (2), (5) and (6), Article 49 and, where appropriate, Article 50.

...

5. For any registration of economic operators of other Member States in an official list or for their certification by the bodies referred to in paragraph 1, no further proof or statements can be required other than those requested of national economic operators and, in any event, only those provided for under Articles 45 to 49 and, where appropriate, Article 50.

However, economic operators from other Member States may not be obliged to undergo such registration or certification in order to participate in a public contract. The contracting authorities shall recognise equivalent certificates from bodies established in other Member States. They shall also accept other equivalent means of proof.

6. Economic operators may ask at any time to be registered in an official list or for a certificate to be issued. They must be informed within a reasonably short period of time of the decision of the authority drawing up the list or of the competent certification body.

...'

- 7 Article 2(1) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 (OJ 2007 L 335, p. 31; 'Directive 89/665'), provides:

'1. Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for powers to:

- (a) take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority;
- (b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;
- (c) award damages to persons harmed by an infringement.

2. The powers specified in paragraph 1 and Articles 2d and 2e may be conferred on separate bodies responsible for different aspects of the review procedure.

...

9. Where bodies responsible for review procedures are not judicial in character, written reasons for their decisions shall always be given. Furthermore, in such a case, provision must be made to guarantee procedures whereby any allegedly illegal measure taken by the review body or any alleged defect in the exercise of the powers conferred on it can be the subject of judicial review or review by another body which is a court or tribunal within the meaning of Article [267 TFEU] and independent of both the contracting authority and the review body.

The members of such an independent body shall be appointed and leave office under the same conditions as members of the judiciary as regards the authority responsible for their appointment, their period of office, and their removal. At least the President of this independent body shall have the

same legal and professional qualifications as members of the judiciary. The independent body shall take its decisions following a procedure in which both sides are heard, and these decisions shall, by means determined by each Member State, be legally binding.’

Spanish law

- 8 Under Article 40(1) and (6) of Royal Legislative Decree 3/2011 of 14 November 2014 adopting the consolidated text of the Law on Public Sector Contracts (Real Decreto Legislativo 3/2011, de 14 de noviembre, por el que se aprueba el texto refundido de la Ley de Contratos del Sector Público) (‘Legislative Decree 3/2011’), the special appeal provided for in matters relating to public procurement, prior to commencement of an administrative-law action, is optional.
- 9 Article 62 of Legislative Decree 3/2011, which is entitled ‘Suitability requirement’, provides:
- ‘1. In order to conclude contracts with the public sector, contractors must demonstrate that they have satisfied the minimum conditions regarding economic, financial and professional or technical suitability, as determined by the contracting authority. This requirement shall be replaced by the classification requirement where classification is prescribed by this Law.
2. The minimum conditions regarding suitability which must be met by the contractor and the documents that are required in order to demonstrate that suitability shall be stated in the contract notice and set out in greater detail in the contract documents. Those conditions must be related to the subject-matter of the contract and proportionate to it.’
- 10 Article 65 of Legislative Decree 3/2011, which is entitled ‘Requirement for classification’, provides:
- ‘1. In order to conclude contracts with public authorities for the performance of works contracts the estimated value of which is EUR 350 000 or more, or service contracts whose estimated value is EUR 120 000 or more, the contractor must, without fail, be duly classified. ...
- ...
5. Public sector entities that are not public authorities may require that tenderers have a particular classification in order to define the conditions regarding suitability that must be met in order to conclude the contract concerned.’
- 11 Article 8 of Decree 221/2013 of the Generalitat de Catalunya, of 3 September 2013, concerning the establishment, organisation and functioning of the Tribunal Català de Contractes del Sector Públic (Catalan Public Sector Contracts Board) (*Diari Oficial de la Generalitat de Catalunya* No 6454, of 5 September 2013), which is entitled ‘Personal status’, provides:
- ‘The personal status of the members of the Tribunal shall be as follows:
1. The members of the Tribunal shall be subject to the same rules on disqualification as senior civil servants of the Generalitat.
- ...
4. The members of the Tribunal shall be appointed on a permanent basis, although they may be dismissed or cease to hold office if any of the following occur:
- death;

- expiry of the term of office without renewal;
- resignation ...
- loss of the status of civil servant;
- serious breach of duty;
- ...
- inability to carry out duties ...
- loss of nationality.
- ...

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

- 12 The Maresme Health Consortium sought to participate in a tendering procedure for the award of nuclear magnetic resonance services for healthcare centres managed by the Corporació de Salut del Maresme i la Selva. The contract documents relating to the call for tenders required the tenderers to establish their capacity to contract by producing a certificate referred to as a ‘classification’ certificate.
- 13 When the evaluation committee opened the tenders, it found that the Maresme Health Consortium had not submitted the required certificate and asked the consortium to produce it. The consortium failed to produce the certificate but did provide a declaration whereby it undertook to allocate for the purposes of the relevant contract the resources of a commercial entity and also provided a declaration attesting to its status as a public entity. In those circumstances, the contracting authority, on 28 November 2013, notified the Maresme Health Consortium that it would not be admitted to the procedure as it had not remedied, in the manner required and within the time allowed, the defects in the documentation submitted.
- 14 On 10 December 2013 the Maresme Health Consortium brought the special appeal provided for in respect of public procurement matters, challenging the contracting authority’s decision before the referring body. The consortium argued that, because of its status as a public authority, the requirement for a business classification does not apply to it. It has requested (i) that it be admitted to the tendering procedure in question and (ii) that that procedure be suspended.
- 15 In those circumstances, the Tribunal Català de Contractes del Sector Públic decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
- ‘(1) For the purposes of Directive 2004/18, must public authorities be regarded as public entities?
 - (2) If so, for the purposes of Directive 2004/18, must public authorities be regarded as economic operators, and therefore as being permitted to participate in public tenders?
 - (3) If so, for the purposes of Directive 2004/18, may and must public authorities be included in the official lists of approved contractors, suppliers or service providers or be certified by certification bodies established under public or private law, known under Spanish law as a business classification system?

- (4) For the purposes of Directive 2004/18, has Legislative Decree 3/2011 incorrectly transposed that directive into Spanish law, and if this is the case, has the Spanish legislature, through Articles 62 and 65 of that decree, limited the access of public authorities to the business classification registers?
- (5) If public authorities may participate in tendering procedures but may not be accepted for business classification — in accordance with Directive 2004/18/EC — by what means may they establish their suitability to contract?

Consideration of the questions referred for a preliminary ruling

The Court's jurisdiction

- 16 Before addressing the questions raised, consideration must be given to whether the Court has jurisdiction to answer them.
- 17 As regards, first, the assessment of 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 will take 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, *inter alia*, judgments in *Vaassen-Göbbels*, 61/65, EU:C:1966:39, and *Umweltanwalt von Kärnten*, C-205/08, EU:C:2009:767, paragraph 35 and the case-law cited). Thus, even though, as the order for reference indicates, the Tribunal Català de Contractes del Sector Públic is regarded under Spanish law as an administrative body, that fact is not, in itself, conclusive for the purpose of the Court's assessment.
- 18 With regard (i) to the criteria concerning whether the body making the reference is established by law, whether it is permanent, whether its procedure is *inter partes* and whether it applies rules of law, the documents before the Court contain nothing which suggests that the Tribunal Català de Contractes del Sector Públic is not a 'court or tribunal' within the meaning of Article 267 TFEU.
- 19 So far as (ii) the criterion of independence is concerned, it is apparent from the documents before the Court that the Tribunal Català de Contractes del Sector Públic acts as a third party in relation to the authority which adopted the decision challenged in the main proceedings (see judgments in *Corbiau*, C-24/92, EU:C:1993:118, paragraph 15, and *Wilson*, C-506/04, EU:C:2006:587, paragraph 49). In that regard, it would appear that the Tribunal carries out its functions in a wholly independent manner, not occupying a hierarchical or subordinate position in relation to any other body and not taking orders or instructions from any source whatsoever (see judgment in *Torresi*, C-58/13 and C-59/13, EU:C:2014:2088, paragraph 22); it is thus protected against external intervention or pressure liable to jeopardise the independent judgment of its members (judgments in *Wilson*, C-506/04, EU:C:2006:587, paragraph 51, and *TDC*, C-222/13, EU:2014:2265, paragraph 30).
- 20 Nor is it disputed that the Tribunal Català de Contractes del Sector Públic complies, when performing its duties, with the requirement for objectivity and impartiality vis-à-vis the parties to the proceedings and their respective interests with regard to the subject-matter of those proceedings. Furthermore, under Article 8(4) of Decree 221/2013 of the Generalitat de Catalunya, the members of the Tribunal are appointed on a permanent basis and cease to hold office only in the circumstances expressly set out in Article 8 (see judgments in *Wilson*, C-506/04, EU:C:2006:587, paragraphs 52 and 53, and *TDC*, C-222/13, EU:2014:2265, paragraphs 31 and 32).
- 21 The referring body therefore satisfies the criterion of independence.

- 22 As regards (iii) whether the jurisdiction of the body making the reference is compulsory within the meaning of the Court's case-law on Article 267 TFEU, it is true that, under Article 40(6) of Legislative Decree 3/2011, the referring body's jurisdiction is optional. Thus, a person bringing proceedings in a public procurement case may choose between a special appeal to the referring body and an administrative-law action.
- 23 In this regard, it must nevertheless be observed that the decisions of the referring body, whose jurisdiction does not depend on the parties' agreement, are binding on the parties (see order in *Merck Canada*, C-555/13, EU:C:2014:92, paragraph 18 and the case-law cited; and judgment in *Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta*, C-377/13, EU:C:2014:1754, paragraph 28).
- 24 Moreover, the Spanish Government explained at the hearing that, in practice, tenderers in public procurement procedures do not generally avail themselves of the possibility of directly initiating an administrative-law action, without having first brought a special appeal of the kind in the main proceedings before the Tribunal Català de Contractes del Sector Públic. Essentially, the administrative courts are thus, as a general rule, involved at second instance, with the result that, in the Autonomous Community of Catalonia, primary responsibility for ensuring that EU public procurement law is observed lies with the referring body.
- 25 In those circumstances, the Tribunal Català de Contractes del Sector Públic also satisfies the criterion of compulsory jurisdiction.
- 26 Finally, it should be recalled that the Court, in assessing the legal status of the national bodies mentioned in Article 2(9) of Directive 89/665, which are responsible for reviewing the award of public contracts, has already confirmed the status as a 'court or tribunal' of a number of other national bodies that are in essence comparable to the referring body in the present case (see, inter alia, *Dorsch Consult*, C-54/96, EU:C:1997:413, paragraphs 22 to 38; *Köllensperger and Atzwanger*, C-103/97, EU:C:1999:52, paragraphs 16 to 25; and *Bundesdruckerei*, C-549/13, EU:C:2014:2235, paragraph 22 and the case-law cited).
- 27 The Tribunal Català de Contractes del Sector Públic therefore has the status of a 'court or tribunal' within the meaning of Article 267 TFEU.
- 28 Secondly, the Spanish Government submits that the requirement for classification laid down by Spanish law does not apply to undertakings established in Member States other than the Kingdom of Spain. It argues that the questions referred are thus a purely internal matter and that it is not necessary either to apply or to interpret EU law in order to resolve them.
- 29 So far as this point is concerned, it must be recalled that the Court does not, in principle, have jurisdiction to reply to a question referred for a preliminary ruling where it is obvious that the rule of EU law referred to it for interpretation is incapable of applying (judgments in *Caixa d'Estalvis i Pensions de Barcelona*, C-139/12, EU:C:2014:174, paragraph 41, and *Wojciechowski*, C-408/14, EU:C:2015:591, paragraph 26; see, also, orders in *Parva Investitsionna Banka and Others*, C-488/13, EU:C:2014:2191, paragraph 26, and *De Bellis and Others*, C-246/14, EU:C:2014:2291, paragraph 14).
- 30 However, the fact that the requirement for classification at issue in the main proceedings does not apply to undertakings established in Member States other than the Kingdom of Spain does not affect the Court's jurisdiction. The Court has already held that nothing in Directives 89/665 and 2004/18 permits the inference that their applicability is dependent on the existence of an actual link with free movement between Member States. Those directives do not make the applicability of their provisions to procedures for the award of public contracts contingent on any condition relating to the nationality or the place of establishment of the tenderers (see, to that effect, judgment in *Michaniki*, C-213/07, EU:C:2008:731, paragraph 29).

31 Accordingly, the Court has jurisdiction to answer the questions referred.

The first and second questions

- 32 By its first and second questions, which it is appropriate to consider together, the referring court asks, in essence, whether Article 1(8) of Directive 2004/18 must be interpreted as meaning that the term ‘economic operator’ in the second subparagraph of that provision, encompasses public authorities and whether the latter may, on that account, participate in public tenders.
- 33 In that regard, it follows both from recital 4 in the preamble to Directive 2004/18, which explicitly mentions the possibility of a ‘body governed by public law’ participating as a tenderer in a procedure for the award of a public contract, and from Article 1(8) of the directive, which specifically acknowledges that any ‘public entity’ may have the status of ‘economic operator’, that Directive 2004/18 does not prevent public authorities from participating in tendering procedures.
- 34 Moreover, the Court has held that any person or entity which, in the light of the conditions laid down in a contract notice, believes that it is capable of carrying out the contract, either directly or by using subcontractors, is eligible to submit a tender or put itself forward as a candidate, regardless of whether it is governed by public law or private law, whether it is consistently active on the market or only on an occasional basis and whether or not it is subsidised by public funds (see judgments in *CoNISMa*, C-305/08, EU:C:2009:807, paragraph 42, and, to that effect, *Data Medical Service*, C-568/13, EU:C:2014:2466, paragraph 35).
- 35 If and to the extent that certain entities are authorised to offer services in return for remuneration on the market, even occasionally, the Member States may not prevent those entities from participating in tendering procedures for the award of public contracts relating to the provision of those services (see, to that effect, judgments in *CoNISMa*, C-305/08, EU:C:2009:807, paragraphs 47 to 49; *Ordine degli Ingegneri della Provincia di Lecce and Others*, C-159/11, EU:C:2012:817, paragraph 27; see also, to that effect, with regard to the corresponding provisions of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), judgment in *Data Medical Service*, C-568/13, EU:C:2014:2466, paragraph 36).
- 36 Consequently, the answer to the first and second questions is that Article 1(8) of Directive 2004/18 must be interpreted as meaning that the term ‘economic operator’ in the second subparagraph of that provision encompasses public authorities, which may therefore participate in public tendering procedures if and to the extent that they are authorised to offer certain services in return for remuneration on a market.

The third question

- 37 By its third question, the referring court asks, in essence, whether Article 52 of Directive 2004/18 must be interpreted as meaning that national public authorities may be included in official lists of approved contractors, suppliers or service providers or certified by certification bodies established under public or private law.
- 38 As regards Member States which have chosen either to establish official lists of approved contractors, suppliers or service providers or to establish certification by certification bodies established under public or private law, it should be stated that although paragraphs 1 and 5 of Article 52 of Directive 2004/18 include certain requirements concerning the determination of the conditions for registration on those lists and for that certification, the directive does not establish (i) whether public entities may be registered on the official lists concerned or be certified or (ii) whether or not the registration or certification in question is compulsory.

- 39 However, as follows, in essence, from paragraph 36 of this judgment, public entities which, under national law, are authorised to offer the works, products or services covered by the contract notice concerned are also entitled to participate in public tendering procedures.
- 40 National rules which would bar public authorities that are authorised, as economic operators, to offer the works, products or services covered by the contract notice concerned from registration on the lists or from the certification in question, whilst reserving the right to participate in a tendering procedure to other economic operators which are registered on those lists or which benefit from certification, would negate the right of those public entities to participate in the tendering procedure concerned and therefore cannot be regarded as compatible with EU law.
- 41 Accordingly, the answer to the third question is that Article 52 of Directive 2004/18 must be interpreted to the effect that — although it includes certain requirements with regard to the determination of the conditions for registration of economic operators on the national official lists and for certification — it does not exhaustively define either (i) the conditions for registration of those economic operators on the national official lists or the conditions for their certification or (ii) the rights and obligations of public entities in that respect. In all events, Directive 2004/18 must be interpreted as precluding national rules under which, on the one hand, national public authorities that are authorised to offer the works, products or services covered by the contract notice concerned may not be registered on those lists, or may not obtain certification, while, on the other hand, the right to participate in the tendering procedure concerned is afforded only to operators which are included on those lists or which have obtained certification.

The fourth question

- 42 By its fourth question, the referring court asks whether Legislative Decree 3/2011 correctly transposed Directive 2004/18 into Spanish law and whether the Spanish legislature, through Articles 62 and 65 of that decree, limited the access of public authorities to the business classification registers.
- 43 In that regard, it must be recalled that, according to settled case-law, it is not for the Court, in preliminary ruling proceedings, to rule upon the compatibility of provisions of national law with EU law or to interpret national legislation or regulations (see, inter alia, *Ascafor and Asidac*, C-484/10, EU:C:2012:113, paragraph 33 and the case-law cited).
- 44 Consequently, the Court does not have jurisdiction to answer the fourth question.

The fifth question

- 45 By its fifth question, the referring court asks, in essence, by what means public authorities may — in the event that they are entitled to participate in public tendering procedures, but may not be registered on an official list of approved economic operators or certified by a certification body — establish their suitability to enter into a given contract under Directive 2004/18.
- 46 By that question, the referring court merely seeks, in the event of Spanish law having to be interpreted in conformity with EU law, an interpretation of Directive 2004/18 in general, without specifying whether, in its view, Spanish law cannot be interpreted in a manner consistent with EU law and, if not, why not. Nor does the referring court mention any specific provisions of that directive whose interpretation by the Court of Justice is necessary in order to enable it to give a decision in the case before it.

47 Consequently, this question does not fulfil the conditions laid down in Article 94(c) of the Rules of Procedure of the Court of Justice, pursuant to which a request for a preliminary ruling must contain a statement of the reasons which prompted the referring court or tribunal to inquire about the interpretation of certain provisions of EU law, and the relationship between those provisions and the national legislation applicable to the main proceedings.

48 In those circumstances, the fifth question must be declared inadmissible.

Costs

49 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 (Grand Chamber) hereby rules:

1. **Article 1(8) 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 meaning that the term ‘economic operator’ in the second subparagraph of that provision encompasses public authorities, which may therefore participate in public tendering procedures if and to the extent that they are authorised to offer certain services in return for remuneration on a market.**
2. **Article 52 of Directive 2004/18 must be interpreted to the effect that — although it includes certain requirements with regard to the determination of the conditions for registration of economic operators on the national official lists and for certification — it does not exhaustively define (i) the conditions for registration of those economic operators on the national official lists or the conditions for their certification or (ii) the rights and obligations of public entities in that respect. In all events, Directive 2004/18 must be interpreted as precluding national rules under which, on the one hand, national public authorities that are authorised to offer the works, products or services covered by the contract notice concerned may not be registered on those lists, or may not obtain certification, while, on the other hand, the right to participate in the tendering procedure concerned is afforded only to operators which are included on those lists or which have obtained certification.**

[Signatures]