Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

17 May 2018*

(Reference for a preliminary ruling — Directive 2004/18/EC — Procedures for the award of public works contracts, public supply contracts and public service contracts — Links between tenderers having submitted separate tenders in the same procedure — Obligations of the tenderers, of the contracting authority and of the national court)

In Case C-531/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Lietuvos Aukščiausiasis Teismas (Supreme Court, Lithuania), made by decision of 11 October 2016, received at the Court on 18 October 2016, in the proceedings

Šiaulių regiono atliekų tvarkymo centras,

'Ecoservice projektai' UAB, formerly 'Specializuotas transportas' UAB,

interveners:

'VSA Vilnius' UAB,

'Švarinta' UAB,

'Specialus autotransportas' UAB,

'Ecoservice' UAB,

THE COURT (Fourth Chamber),

composed of T. von Danwitz, President of the Chamber, C. Vajda, E. Juhász (Rapporteur), K. Jürimäe and C. Lycourgos, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of

– Šiaulių regiono atliekų tvarkymo centras, by L. Songaila, advokatas,

– 'Ecoservice projektai' UAB, by J. Elzbergas, advokatas, and V. Mitrauskas,

* Language of the case: Lithuanian.

– ‘VSA Vilnius’ UAB, by D. Krukonis, advokatas,

– ‘Švarinta’ UAB, par K. Smaliukas, advokatas,

– the Lithuanian Government, by D. Kriaučiūnas, G. Taluntytė and R. Butvydytė, acting as Agents,

– the Czech Government, by M. Smolek, T. Müller and J. Vláčil, acting as Agents,

– the European Commission, by A. Tokár and A. Steiblytė, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 22 November 2017,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 45, 56 and 101 TFEU, of Article 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), and of the third subparagraph of Article 1(1) and Article 2(1)(b) 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’).

2 The request has been made in proceedings between ‘VSA Vilnius’ UAB and Šiaulių regiono atliekų tvarkymo centras (centre for waste management for the region of Šiauliai, Lithuania) concerning the award, by that centre, of a public service contract relating to the collection of communal waste of the municipal authority of Šiauliai and its transportation to the place of treatment.

Legal context

Directive 89/665

3 The third paragraph of Article 1(1) of Directive 89/665 provides as follows:

‘Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of Directive 2004/18/EC, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 2 to 2f of this Directive, on the grounds that such decisions have infringed [EU] law in the field of public procurement or national rules transposing that law.’

4 Under Article 2(1)(b) of that directive:

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

…

(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;

…'

Directive 2004/18

5 Article 2 of Directive 2004/18 is worded as follows:

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

6 Article 45(2) of that directive states:

'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.'

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

7 On 9 July 2015, the centre for waste management for the region of Šiauliai announced a public call for tenders for the provision of services relating to the collection of communal waste of the municipal authority of Šiauliai and its transportation to the place of treatment.

8 Four tenderers submitted tenders: 'Specializuotas transportas' UAB ('tenderer B'), 'Ekonovus' UAB, 'Specialus autotransportas' UAB ('tenderer A') et and the group of operators VSA Vilnius and 'Švarinta' UAB.

9 Tenderers A and B are subsidiaries of 'Ecoservice' UAB, which holds 100% and 98.2%, respectively, of the shares of those undertakings. The Boards of Directors of tenderers A and B are made up of the same persons.

10 The national legislation applicable at the time of publication of the call for tenders did not expressly provide that a tenderer is obliged to disclose its links with other operators participating in the same tendering procedure, or that the contracting authority is obliged to verify, assess or take account of those links for the purpose of its decisions. Nor were those obligations provided for in the tender specifications.

11 Nonetheless, tenderer B submitted, along with its tender, a declaration of honour to the effect that it was taking part in the tendering procedure autonomously and independently of any other economic operators that might be connected to it, and it requested the contracting authority to treat all other operators as competitors. It further stated that it undertook, should it be so required by the contracting authority, to provide a list of economic operators connected to it.

12 On 24 September 2015, the contracting authority rejected tenderer A's tender on the ground that the engines of two of its collection vehicles did not meet the required quality standards. Tenderer A did not contest that decision.

13 On 22 October 2015, the contracting authority informed the tenderers of the classification of the tenders and the award of the contract to tenderer B.

14 VSA Vilnius, which had been classified directly after tenderer B, filed a complaint with the contracting authority, arguing that the tenderers' offers had not been properly evaluated and that the principles of equal treatment and transparency had been infringed. It considered that tenderers A and B had acted as an association of undertakings, that their offers constituted variants and that, given that the call for tenders prohibited the submission of variants, their offers should have been rejected by the contracting authority.

15 Following the rejection of its complaint by the contracting authority, VSA Vilnius brought an action before the Šiaulių apygardos teismas (Regional Court, Šiauliai, Lithuania). By judgment of 18 January 2016, that court annulled the decisions of the contracting authority establishing a classification of the tenders and awarding the contract to tenderer B. On 5 April 2016, the Lietuvos apeliacinis teismas (Court of Appeal, Lithuania) confirmed that judgment.

16 The courts of first instance and appeal considered that the contracting authority, although it was aware of the link between tenderers A and B, took no steps to determine the influence of that link on whether the competition between those tenderers was genuine. Although national legislation does not provide for such an obligation, since tenderers A and B were each aware of the other's participation in the tendering procedure, they should have disclosed their links to the contracting authority. The declaration of honour submitted by tenderer B was insufficient to establish that that obligation had been properly performed.

17 VSA Vilnius and tenderer B both subsequently appealed on a point of law to the referring court.

18 In those circumstances, the Lietuvos Aukščiausiasis Teismas (Supreme Court, Lithuania) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Must the free movement of persons and services provided for in Articles 45 TFEU and 56 TFEU respectively, the principles of equality of tenderers and of transparency provided for in Article 2 of Directive 2004/18 and the principle, which flows from those principles, of free and fair competition between economic operators (together or separately, but without limitation to those provisions) be understood and interpreted as meaning that:

if related tenderers, whose economic, management, financial or other links may give rise to doubts as to their independence and the protection of confidential information and/or may provide the preconditions (potential) for them to have an advantage over other tenderers, have decided to submit separate (independent) tenders in the same public procurement procedure, are they, in any event, obliged to disclose those links between them to the contracting authority, even if the contracting authority does not inquire of them separately, irrespective of whether or not the national legal rules governing public procurement state that such an obligation does in fact exist?

(2) If the answer to the first question:
(a) is in the affirmative (that is to say, tenderers must in any event disclose their links to the contracting authority), is the circumstance that that obligation was not performed in such a case, or that it was not properly performed, sufficient for the contracting authority to take the view, or for a review body (court) to decide, that related tenderers having submitted separate tenders in the same public procurement procedure are participating without genuinely being in competition (and are engaged in sham competition)?
(b) is in the negative (that is to say, tenderers have no obligation to disclose their links other than that laid down in legislation or in the tendering conditions), must the risk posed by participation of related economic operators and the risk of the consequences flowing from this then be borne by the contracting authority, if the contracting authority did not indicate in the public tendering documentation that tenderers had such an obligation of disclosure?

(3) Irrespective of the answer to the first question, and having regard to the judgment of 12 March 2015, *eVigilo* (C-538/13, EU:C:2015:166), must the provisions of law referred to in the first question and the third subparagraph of Article 1(1) of Directive 89/665 and Article 2(1)(b) of that directive (together or separately, but without limitation to those provisions) be understood and interpreted as meaning that:
(a) if, in the course of the public procurement procedure, it becomes clear, in whatever way, to the contracting authority that significant links (connections) exist between certain tenderers, that contracting authority must, irrespective of its own assessment of that fact and (or) of other circumstances (for example, the formal and substantive dissimilarity of the tenders submitted by the tenderers, the formal undertaking given by a tenderer to engage in fair competition with other tenderers, etc.), separately address the related tenderers and request them to clarify whether, and if so how, their personal situation is compatible with free and fair competition between tenderers?
(b) if the contracting authority has such an obligation but fails to perform it, is there a sufficient basis for the court to declare that the contracting authority has acted unlawfully, having failed to ensure procedural transparency and objectivity, and having failed to request evidence from the applicant or having failed to take a decision, on its own initiative, as to the possible influence that the personal situation of related persons might have on the outcome of the tendering procedure?

(4) Must the legal provisions referred to in the third question and Article 101(1) TFEU (together or separately, but without limitation to those provisions), be understood and interpreted, in the light of the judgments of 12 March 2015, *eVigilo* (C-538/13, EU:C:2015:166); of 21 January 2016, *Eturas and Others* (C-74/14, EU:C:2016:42); and of 21 July 2016, *VM Remonts and Others* (C-542/14, EU:C:2016:578), as meaning that:

(a) where a tenderer (the applicant) has become aware of the rejection of the lowest-priced tender submitted by one of two related tenderers in a public tendering procedure (tenderer A) and of the fact that the other tenderer (tenderer B) has been declared the successful tenderer, and also having regard to other circumstances connected with those tenderers and their participation in the tendering procedure (the fact that tenderers A and B have the same board of directors; the fact that they have the same parent company, which did not take part in the tendering procedure; the fact that tenderers A and B did not disclose their links to the contracting authority and did not separately provide additional clarifications as to those links, inter alia because no inquiries had been made of them; the fact that tenderer A provided, in its tender, inconsistent information on the compliance by the proposed means of transport (refuse lorries) with the EURO V condition of the call for tenders; the fact that that tenderer, which submitted the lowest-priced tender, which was rejected because of deficiencies identified in it, first, did not challenge the contracting authority's decision and, second, lodged an appeal against the judgment of the court of first instance, in which appeal, inter alia, it [challenged] the lawfulness of the rejection of its tender; etc.), and where, in respect of all of those circumstances, the contracting authority did not take any action, is that information alone sufficient to found a claim addressed to the review body that it should regard as unlawful the actions of the contracting authority in failing to ensure procedural transparency and objectivity, and, in addition, in not requiring the applicant to provide concrete evidence that tenderers A and B were acting unfairly?

(b) tenderers A and B did not prove to the contracting authority that they were genuinely and fairly taking part in the public tendering procedure solely because tenderer B voluntarily submitted a declaration of genuine participation, the management quality standards for participating in public tendering were applied by tenderer B, and, in addition, the tenders submitted by those tenderers were not formally and substantively identical?

(5) Can the actions of mutually related economic operators (both of which are subsidiaries of the same company) which are participating separately in the same tendering procedure, the value of which reaches the value for international competitive tendering, and where the seat of the contracting authority which announced the tendering procedure and the place where the services are to be provided are not very far distant from another Member State (the Republic of Latvia), be in principle assessed — regard being had to, inter alia, the voluntary submission by one of those economic operators that it would be engaging in fair competition — under the provisions of Article 101 TFEU and the case-law of the Court of Justice which interprets those provisions?'

Consideration of the questions referred

19 At the outset, it must be noted that, in the questions referred for a preliminary ruling, the referring court refers to Articles 45 and 56 TFEU, without however explaining to what extent the interpretation of those articles is necessary for the purpose of answering those questions. In addition, as is apparent from the order for reference, Directive 2004/18 is relevant to the resolution of the dispute in the main proceedings. In those circumstances, there is no need to interpret Articles 45 and 56 TFEU.

The first and second questions

20 By its first and second questions, the referring court asks, in essence, whether Article 2 of Directive 2004/18 must be interpreted as meaning that, failing any express legislative provision or specific condition in the call for tenders or in the tender specifications governing the conditions for the award of a public contract, related tenderers submitting separate offers in the same procedure are obliged to disclose, on their own initiative, the links between them to the contracting authority.

21 In that regard, it should be recalled, first of all, that EU law, Directive 2004/18 specifically, does not generally prohibit related undertakings from submitting offers in a public procurement procedure. In addition, according to case-law, in the light of EU interest in ensuring the widest possible participation by tenderers in a tendering procedure, it would run counter to the effective application of EU law to exclude systematically related undertakings from participating in the same public procurement procedure (see, to that effect, judgment of 19 May 2009, *Assitur*, C-538/07, EU:C:2009:317, paragraphs 26 and 28).

22 The Court has also pointed out that groups of undertakings can have different forms and objectives, which do not necessarily preclude controlled undertakings from enjoying a certain autonomy in the conduct of their commercial policy and their economic activities, inter alia, in the area of their participation in the award of public contracts. Moreover, relationships between undertakings in the same group may be governed by specific provisions, for example of a contractual nature, such as to guarantee both independence and confidentiality in the drawing-up of tenders to be submitted simultaneously by the undertakings in question in the same tendering procedure (judgment of 19 May 2009, *Assitur*, C-538/07, EU:C:2009:317, paragraph 31).

23 Next, with regard to whether, failing any express legislative provision or specific condition in the call for tenders or the tender specifications governing the conditions for the award of a public contract, tenderers are nonetheless obliged to disclose the links between them to the contracting authority, it must be noted that the Court has stated that the principles of transparency and equal treatment which govern all public procurement procedures require the substantive and procedural conditions concerning participation in a contract to be clearly defined in advance and made public, in particular the obligations of tenderers, in order that those tenderers may know exactly the procedural requirements and be sure that the same requirements apply to all candidates (judgment of 2 June 2016, *Pizzo*, C-27/15, EU:C:2016:404, paragraph 37 and the case-law cited).

24 Requiring tenderers to disclose, on their own initiative, their links to other tenderers, although neither applicable national legislation nor the call for tenders or the tender specifications provide for such an obligation, does not constitute a clearly defined condition for the purpose of the case-law in the previous paragraph. In those circumstances, it would be difficult for tenderers to determine the exact scope of that obligation, all the more so since it is not always possible, due to the very nature of a public procurement procedure, to know the identity of all the tenderers in the same procedure before the closing date for the submission of tenders.

25 In addition, it should be noted that, failing any obligation imposed on the tenderers to inform the contracting authority of any links they may have to other tenderers, the contracting authority must treat the concerned tenderer's offer, throughout the procedure, as an offer that complies with Directive 2004/18, provided that there is no evidence that tenders submitted by related tenderers are coordinated or concerted.

26 In the light of the foregoing considerations, the answer to the first and second questions is that Article 2 of Directive 2004/18 must be interpreted as meaning that, failing any express legislative provision or specific condition in the call for tenders or in the tender specifications governing the

conditions for the award of a public contract, related tenderers submitting separate offers in the same procedure are not obliged to disclose, on their own initiative, the links between them to the contracting authority.

The third to fifth questions

27 By its third to fifth questions, the referring court asks, in essence, whether, in circumstances such as those in the main proceedings, Article 101 TFEU is applicable and whether Article 2 of Directive 2004/18 and the third subparagraph of Article 1(1) and Article 2(1)(b) of Directive 89/665 must be interpreted as meaning that the contracting authority, when it has evidence that calls into question the autonomous character of the tenders submitted by certain tenderers, is obliged to verify, requesting, where appropriate, additional information from those tenderers, whether their offers are in fact autonomous and, if it fails to do so, whether the contracting authority's failure to act is capable of vitiating the ongoing public procurement procedure.

28 It must be borne in mind that Article 101 TFEU does not apply where the agreements or practices it prohibits are carried out by undertakings which constitute an economic unit (see, to that effect, judgments of 4 May 1988, *Bodson*, 30/87, EU:C:1988:225, paragraph 19, and of 11 April 1989, *Saeed Flugreisen and Silver Line Reisebüro*, 66/86, EU:C:1989:140, paragraph 35). It is, however, for the referring court to verify whether tenderers A and B constitute an economic unit.

29 Where the companies concerned do not constitute an economic unit, that is to say, where the parent company does not have a determining influence on its subsidiaries, it should be noted that, in all events, the principle of equal treatment under Article 2 of Directive 2004/18 would be infringed if related tenderers were allowed to submit coordinated or concerted tenders, that is to say, tenders that are neither autonomous nor independent, which would be likely to give them unjustified advantages in relation to the other tenderers, without there being any need to examine whether the submission of such tenders constitutes conduct in breach of Article 101 TFEU.

30 Consequently, in order to answer the third to fifth questions, Article 101 TFEU need not be applied or interpreted in the present case.

31 As regards the obligations of contracting authorities under Article 2 of Directive 2004/18, the Court has already stated that contracting authorities are assigned an active role in the application of the principles of public procurement set out in that article (see, to that effect, judgment of 12 March 2015, *eVigilo*, C-538/13, EU:C:2015:166, paragraph 42).

32 Since that obligation relates to the very essence of the public procurement directives, the Court has ruled that the contracting authority is, at all events, required to determine whether any conflicts of interests concerning the contracting authority's expert exist and to take appropriate measures in order to prevent and detect conflicts of interests and remedy them (judgment of 12 March 2015, *eVigilo*, C-538/13, EU:C:2015:166, paragraph 43).

33 That case-law is, in the light of the findings in paragraph 29 of the present judgment, applicable to situations such as that at issue in the main proceedings where related tenderers are participants in a public procurement procedure. Therefore, a contracting authority that acquaints itself with objective evidence calling into question the autonomous and independent nature of a tender is obliged to examine all the relevant circumstances having led to the submission of the tender concerned in order to prevent and detect the elements capable of vitiating the tendering procedure and remedy them, where appropriate, requesting the parties to provide certain information and evidence (see, by analogy, judgment of 12 March 2015, *eVigilo*, C-538/13, EU:C:2015:166, paragraph 44).

34 As far as concerns the evidence capable of demonstrating whether tenders submitted by related tenderers are autonomous and independent, it appears from the order for reference that the referring court is uncertain, inter alia, whether any kind of evidence, or direct evidence in the context of judicial proceedings only, may be taken into account.

35 The third subparagraph of Article 1(1) and Article 2(1)(b) of Directive 89/665, to which the third and fourth questions refer, merely require, in particular, Member States to set up rapid and efficient review procedures in the field of public procurement. Neither those provisions of Directive 89/665, nor any other provision of that directive or Directive 2004/18, lay down rules governing the taking and assessment of evidence of a breach of the EU rules governing public procurement.

36 In those circumstances and in accordance with settled case-law of the Court, failing any EU rules governing the matter, it is for every Member State to lay down the detailed rules of administrative and judicial procedures for safeguarding rights which individuals derive from EU law. Those detailed procedural rules must, however, be no less favourable than those governing similar domestic actions (principle of equivalence) and must not render impossible in practice or excessively difficult the exercise of rights conferred by EU law (principle of effectiveness) (judgment of 12 March 2015, *eVigilo*, C-538/13, EU:C:2015:166, paragraph 39 and the case-law cited).

37 As concerns the standard of proof required in order to determine that a tender is neither autonomous nor independent, the principle of effectiveness requires that a breach of the EU rules governing public procurement may be proved not only by direct evidence, but also through indicia, provided that they are objective and consistent and that the related tenderers are in a position to submit evidence in rebuttal (see, by analogy, judgment of 21 January 2016, *Eturas and Others*, C-74/14, EU:C:2016:42, paragraph 37).

38 As regards a case such as that in the main proceedings, the finding that the links between tenderers had a bearing on the content of the tenders they submitted during the same procedure suffices, in principle, for those tenders not to be taken into consideration by the contracting authority, as tenders by related undertakings must be submitted completely autonomously and independently. However, a mere finding of a relationship of control between the undertakings concerned, by reason of ownership or the number of voting rights exercisable at ordinary shareholders' meetings, is not sufficient for the contracting authority to exclude automatically those tenders from the procedure for the award of the contract, without ascertaining whether such a relationship had a specific effect on the independence of those tenders (see, by analogy, judgment of 19 May 2009, *Assitur*, C-538/07, EU:C:2009:317, paragraph 32).

39 It is for the referring court, in the light of the circumstances of the dispute in the main proceedings, to carry out the necessary verifications and assessments in that regard, as well as with regard to the circumstances in paragraph (a) of the fourth question and to the probative value of the spontaneous declaration made by a tenderer, mentioned in paragraph (b) of that question. In the event that that court should come to the conclusion, following those verifications and assessments, that the tenders at issue in the main proceedings were not submitted autonomously and independently, it is to be recalled that Article 2 of Directive 2004/18 must be interpreted as precluding the award of the contract to the tenderers having submitted those tenders.

40 In the light of the foregoing considerations, the answer to the third to the fifth questions is that Article 2 of Directive 2004/18 must be interpreted as meaning that the contracting authority, when it has evidence that calls into question the autonomous and independent character of the tenders submitted by certain tenderers, is obliged to verify, requesting, where appropriate, additional information from those tenderers, whether their offers are in fact autonomous and independent. If the offers prove not to be autonomous and independent, Article 2 of Directive 2004/18 precludes the award of the contract to the tenderers having submitted those tenders.

Costs

41 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 (Fourth Chamber) hereby rules:

Article 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 meaning that:

— **failing any express legislative provision or specific condition in the call for tenders or in the tender specifications governing the conditions for the award of a public contract, related tenderers submitting separate offers in the same procedure are not obliged to disclose, on their own initiative, the links between them to the contracting authority;**

— **the contracting authority, when it has evidence that calls into question the autonomous and independent character of the tenders submitted by certain tenderers, is obliged to verify, requesting, where appropriate, additional information from those tenderers, whether their offers are in fact autonomous and independent. If the offers prove not to be autonomous and independent, Article 2 of Directive 2004/18 precludes the award of the contract to the tenderers having submitted those tenders.**

[Signatures]