



Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

6 June 2019*

(Reference for a preliminary ruling — Procedures for the award of public works contracts, public supply contracts and public service contracts — Directive 2014/24/EU — Article 10, (c), and (d)(i), (ii) and (v) — Validity — Scope — Exclusion of arbitration and conciliation services and of certain legal services — Principles of equal treatment and subsidiarity — Articles 49 and 56 TFEU)

In Case C-264/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Grondwettelijk Hof (Constitutional Court, Belgium), made by decision of 29 March 2018, received at the Court on 13 April 2018, in the proceedings

P. M.,

N. G.d.M.,

P. V.d.S.

v

Ministerraad,

THE COURT (Fifth Chamber),

composed of E. Regan (Rapporteur), President of the Chamber, C. Lycourgos, E. Juhász, M. Ilešič and I. Jarukaitis, Judges,

Advocate General: M. Bobek,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of

- P. M., P. V.d.S., and N. G.d.M., by P. Vande Casteele, advocaat,
- the Belgian Government, by J.-C. Halleux, P. Cottin, L. Van den Broeck and C. Pochet, acting as Agents, assisted by D. D’Hooghe, C. Mathieu and P. Wytinck, advocaten.
- the Czech Government, by M. Smolek and J. Vlácil, acting as Agents,

* Language of the case: Dutch.

- the Greek Government, by M. Tassopoulou, S. Papaioannou and S. Charitaki, acting as Agents,
- the Cypriot Government, by D. Kalli and E. Zachariadou, acting as Agents,
- the European Parliament, by A. Pospíšilová Padowska and R. van de Westelaken, acting as Agents,
- the Council of the European Union, by M. Balta and F. Naert, acting as Agents,
- the European Commission, by L. Haasbeek and P. Ondrůšek, acting as Agents,

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

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 10(c) and (d)(i), (ii) and (v) of 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).
- 2 The request has been made in proceedings between P. M., N. G.d.M. and P. V.d.S. and the Ministerraad (Council of Ministers, Belgium) concerning the exclusion, under the Belgian law transposing Directive 2014/24, of certain legal services from the application of the procedures for the award of public contracts.

Legal context

European Union law

- 3 Recitals 1, 4, 24 and 25 of Directive 2014/24 state:
 - ‘(1) The award of public contracts by or on behalf of Member States’ authorities has to comply with the principles of the Treaty on the Functioning of the European Union (TFEU), and in particular the free movement of goods, freedom of establishment and the freedom to provide services, as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency. However, for public contracts above a certain value, provisions should be drawn up coordinating national procurement procedures so as to ensure that those principles are given practical effect and public procurement is opened up to competition.
 - ...
 - (4) The increasingly diverse forms of public action have made it necessary to define more clearly the notion of procurement itself; that clarification should not however broaden the scope of this Directive compared to that 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 Union rules on public procurement are not intended to cover all forms of disbursement of public funds, but only those aimed at the acquisition of works, supplies or services for consideration by means of a public contract. ...
 - ...

- (24) It should be recalled that arbitration and conciliation services and other similar forms of alternative dispute resolution are usually provided by bodies or individuals which are agreed on, or selected, in a manner which cannot be governed by procurement rules. It should be clarified that this Directive does not apply to service contracts for the provision of such services, whatever their denomination under national law.
- (25) A certain number of legal services are rendered by service providers that are designated by a court or tribunal of a Member State, involve representation of clients in judicial proceedings by lawyers, must be provided by notaries or are connected with the exercise of official authority. Such legal services are usually provided by bodies or individuals designated or selected in a manner which cannot be governed by procurement rules, such as for instance the designation of State Attorneys in certain Member States. Those legal services should therefore be excluded from the scope of this Directive.’
- 4 Article 10 of that directive, entitled ‘Specific exclusions for service contracts’, provides in points (c) and (d):
- ‘This Directive shall not apply to public service contracts for:
- ...
- (c) arbitration and conciliation services;
- (d) any of the following legal services:
- (i) legal representation of a client by a lawyer within the meaning of Article 1 of Council Directive 77/249/EEC [of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services (OJ 1977 L 78, p. 17)], in:
- an arbitration or conciliation held in a Member State, a third country or before an international arbitration or conciliation instance; or
 - judicial proceedings before the courts, tribunals or public authorities of a Member State or a third country or before international courts, tribunals or institutions;
- (ii) legal advice given in preparation of any of the proceedings referred to in point (i) of this point or where there is a tangible indication and high probability that the matter to which the advice relates will become the subject of such proceedings, provided that the advice is given by a lawyer within the meaning of Article 1 of Directive [77/249];
- ...
- (v) other legal services which in the Member State concerned are connected, even occasionally, with the exercise of official authority’.

Belgian law

- 5 By the Law on public contracts of 17 June 2016 (*Moniteur belge* of 14 July 2016, p. 44219), the Belgian legislature revised the procurement rules and brought its legislation into line with Directive 2014/24. Paragraph 28 of that law provides:
- ‘(1) Subject to paragraph 2, the following public service contracts shall not be subject to this law:
- ...
- 3° arbitration and conciliation services;

4° any of the following legal services:

- (a) legal representation of a client by a lawyer within the meaning of Article 1 of Council Directive [77/249], in:
 - (i) an arbitration or conciliation held in a Member State, a third country or before an international arbitration or conciliation instance; or
 - (ii) judicial proceedings before the courts, tribunals or public authorities of a Member State or a third country or before international courts, tribunals or institutions;
- (b) legal advice given in preparation of any of the proceedings referred to in point (a) of this point or where there is a tangible indication and high probability that the matter to which the advice relates will become the subject of such proceedings, provided that the advice is given by a lawyer within the meaning of Article 1 of Directive [77/249];

...

- (e) other legal services which in the Member State concerned are connected, even on an occasional basis, with the exercise of public authority;

...

(2) The King may establish procurement rules to which the contracts covered by paragraph 1, 4(a) and (b) shall be subject, in circumstances that He shall determine.'

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

- 6 On 16 January 2017, P. M., N. G.d.M. and P. V.d.S., the applicants in the main proceedings, brought an action for annulment before the referring court, the Grondwettelijk Hof (Constitutional Court, Belgium), against the provisions of the Law on public contracts, which excludes certain legal services and certain arbitration and conciliation services from the scope of application of that law.
- 7 The applicants in the main proceedings submit that those provisions create, in so far as their effect is to exclude the award of contracts for the services they cover from the public procurement rules laid down by that law, a difference of treatment which cannot be justified.
- 8 The referring court therefore considers that the question arises as to whether the exclusion of those services from the public procurement rules breaches the objectives, pursued by the European Union legislature by the adoption of Directive 2014/24, relating to full competition, freedom to provide services and freedom of establishment, and whether the principles of subsidiarity and equal treatment should have led to the harmonisation of EU law rules as regards those services also.
- 9 According to that court, in order to assess the constitutionality of the provisions of national law, the annulment of which is sought before it, it is necessary to examine whether the provisions of Article 10(c) and (d)(i), (ii) and (v) of that directive comply with the principles of equal treatment and subsidiarity and with Articles 49 and 56 TFEU.
- 10 In those circumstances, the Grondwettelijk Hof (Constitutional Court) decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'Is Article 10[(c) and (d)(i), (ii) and (v)] of [Directive 2014/24] compatible with the principle of equal treatment, whether or not read in conjunction with the principle of subsidiarity and with Articles 49 and 56 [TFEU], since the services mentioned therein are excluded from the application of the procurement rules in the aforementioned directive which nevertheless guarantee full competition and free movement in the procurement of services by public authorities?'

Admissibility of the request for a preliminary ruling

- 11 The Czech and Cypriot Governments contest the admissibility of the question referred and therefore the reference for a preliminary ruling.
- 12 The Czech Government alleges that the question bears no relation to the actual facts of the main action or its purpose, which concerns whether the Belgian constitution precludes national law from excluding from the scope of national public procurement rules certain legal services also excluded from the scope of application of Directive 2014/24. However, EU law does not oblige a Member State to include the services in question within the scope of the national rules which implement it. That question should therefore be decided purely on the basis of the Belgian constitution.
- 13 The Cypriot Government submits that the question referred concerns whether Article 10(c) and (d)(i), (ii) and (v) of that directive is consistent with Articles 49 and 56 TFEU. However, any national measure in an area which has been the subject of exhaustive harmonisation at EU level must be assessed in the light of the provisions of that harmonising measure and not those of primary law.
- 14 In that regard, it should be remembered that, when a question on the validity of a measure adopted by the institutions of the European Union is raised before a national court, it is for that court to decide whether a decision on the matter is necessary to enable it to give judgment and, consequently, whether it should request the Court to rule on that question. Consequently, where the questions referred by the national court or tribunal concern the validity of a provision of EU law, the Court is, as a general rule, obliged to give a ruling (judgments of 11 November 1997, *Eurotunnel and Others*, C-408/95, EU:C:1997:532, paragraph 19, of 10 December 2002, *British American Tobacco (Investments) and Imperial Tobacco*, C-491/01, EU:C:2002:741, paragraph 34 and of 28 March 2017, *Rosneft*, C-72/15, EU:C:2017:236, paragraph 49).
- 15 The Court may refuse to give a ruling on a question referred by a national court for a preliminary ruling, under Article 267 TFEU, only where, for instance, the requirements concerning the content of a request for a preliminary ruling, set out in Article 94 of the Rules of Procedure of the Court, are not satisfied or where it is quite obvious that the interpretation of a provision of EU law, or the assessment of its validity, which is sought by the national court, bears no relation to the actual facts of the main action or to its purpose or where the problem is hypothetical (judgment of 28 March 2017, *Rosneft*, C-72/15, EU:C:2017:236, paragraph 50).
- 16 In the present case, it is clear from the order for reference that the national provisions at issue in the main proceedings, the annulment of which is sought before the referring court, concern the law which transposes, into Belgian law, Directive 2014/24 and, in particular, the exclusion of certain legal services from its scope of application.
- 17 In those circumstances, contrary to the submissions advanced by the Czech and Cypriot governments, the question of the validity of Article 10(c) and (d)(i),(ii) and (v) of Directive 2014/24 is not irrelevant for the outcome of the dispute in the main proceedings. If the exclusion laid down in those provisions were held to be invalid, the provisions in respect of which annulment is sought before the referring court would also have to be regarded as contrary to EU law.
- 18 It follows from the foregoing considerations that the question referred and, therefore, the reference for a preliminary ruling is admissible.

Consideration of the question referred

- 19 By its question the referring court asks, in essence, the Court of Justice to rule on the validity of the provisions of Article 10(c) and (d)(i), (ii) and (v) of Directive 2014/24, having regard to the principles of equal treatment and subsidiarity, as well as Articles 49 and 56 TFEU.
- 20 As regards, in the first place, the principle of subsidiarity and compliance with Articles 49 and 56 TFEU, it must be recalled, first, that the principle of subsidiarity, set out in Article 5(3) TEU, provides that, in areas which do not fall within its exclusive competence, the European Union is to act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved at EU level (see, to that effect, the judgment of 4 May 2016, *Philip Morris Brands and Others*, C-547/14, EU:C:2016:325, paragraph 215 and the case-law cited).
- 21 It necessarily follows from the fact that the EU legislature excluded from the scope of application of Directive 2014/24 the services covered by Article 10(c) and (d)(i), (ii) and (v) that, in so doing, it considered that it was for national legislatures to determine whether those services should be subject to the public procurement rules.
- 22 Therefore, it cannot successfully be claimed that those provisions were adopted in breach of the principle of subsidiarity.
- 23 Second, as regards compliance with Articles 49 and 56 TFEU, recital 1 of Directive 2014/24 states that the award of public contracts by or on behalf of Member States' authorities must comply with the principles of the Treaty on the Functioning of the European Union, including the provisions concerning the freedom of establishment and the freedom to provide services.
- 24 According to the Court's settled case-law, the purpose of coordinating, at European Union level, the procedures for the award of public contracts is to eliminate barriers to the freedom to provide services and goods and therefore protect the interests of traders established in a Member State who wish to offer goods or services to contracting authorities established in another Member State (see, to that effect, the judgment of 13 November 2007, *Commission v Ireland*, C-507/03, EU:C:2007:676, paragraph 27 and the case-law cited).
- 25 It does not however follow that, by excluding the services covered by Article 10(c) and (d)(i), (ii) and (v) of Directive 2014/24 from its scope of application and, therefore, not requiring Member States to subject those services to public procurement rules, that directive would adversely affect the freedoms guaranteed by the treaties.
- 26 As regards, secondly, the EU legislature's discretion and the general principle of equal treatment, according to its settled case-law, the Court has acknowledged that, in the exercise of the powers conferred on it, the EU legislature has a broad discretion where its action involves political, economic and social choices and where it is called on to undertake complex assessments and evaluations (judgments of 16 December 2008, *Arcelor Atlantique et Lorraine and Others*, C-127/07, EU:C:2008:728, paragraph 57, and of 30 January 2019, *Planta Tabak*, C-220/17, EU:C:2019:76, paragraph 44). Only if a measure adopted in this field is manifestly inappropriate in relation to the objectives which the competent institutions are seeking to pursue can the lawfulness of such a measure be affected (judgment of 14 December 2004, *Swedish Match*, C-210/03, EU:C:2004:802, paragraph 48).
- 27 However, even where it has such a discretion, the EU legislature is obliged to base its choice on objective criteria appropriate to the aim pursued by the legislation in question (judgment of 16 December 2008, *Arcelor Atlantique et Lorraine and Others*, C-127/07, EU:C:2008:728, paragraph 58).

- 28 Furthermore, according to the Court's settled case-law, the principle of equal treatment, as a general principle of EU law, requires comparable situations not to be treated differently and different situations not to be treated in the same way, unless such treatment is objectively justified (judgment of 16 December 2008, *Arcelor Atlantique et Lorraine and Others*, C-127/07, EU:C:2008:728, paragraph 23 and the case-law cited).
- 29 The comparability of different situations must be assessed having regard to all the elements which characterise them. Those elements must, in particular, be determined and assessed in the light of the subject matter and purpose of the EU act which makes the distinction in question. The principles and objectives of the field to which the act relates must also be taken into account (judgment of 12 May 2011, *Luxembourg v Parliament and Council*, C-176/09, EU:C:2011:290, paragraph 32, and of 30 January 2019, *Planta Tabak*, C-220/17, EU:C:2019:76, paragraph 37).
- 30 It is in the light of those principles that the validity of Article 10(c) and (d)(i)(ii) and (v) of Directive 2014/24, having regard to the principle of equality treatment, must be examined.
- 31 Thus, as regards, in the first place, arbitration and conciliation services covered by Article 10(c) of Directive 2014/24, recital 24 thereof states that bodies or individuals providing arbitration and conciliation services and other similar forms of alternative dispute resolution are selected in a manner which cannot be governed by procurement rules.
- 32 Arbitrators and mediators must always be accepted by all parties to a dispute and are designated by them by common agreement. A public body that launches a public procurement procedure for an arbitration or conciliation service may not therefore impose the successful tenderer for that contract on the other party as the common arbitrator or mediator.
- 33 Taking their objective characteristics into account, arbitration and conciliation services, covered by Article 10(c), are not therefore comparable with other services included within the scope of application of Directive 2014/24. It follows that the EU legislature was able, in the exercise of its discretion, to exclude the services covered by Article 10(c) of Directive 2014/24 from its scope of application without infringing the principle of equal treatment.
- 34 In the second place, regarding services provided by lawyers, covered by Article 10(d)(i) and (ii) of Directive 2014/24, it is clear from recital 25 of that directive that the EU legislature took into account the fact that such legal services are usually provided by bodies or individuals designated or selected in a manner which cannot be governed by procurement rules in certain Member States, so that it was appropriate to exclude those legal services from the scope of that directive.
- 35 In that regard, it must be observed that Article 10(d)(i) and (ii) of Directive 2014/24 does not exclude all services provided by a lawyer for the benefit of a contracting authority, but only the legal representation of their client in proceedings before an international arbitration or conciliation instance, before courts or public authorities of a Member State or a third country, or in judicial proceedings before international courts or institutions, and also legal advice given in preparation for, or in view of the probability of, such proceedings. Such services provided by a lawyer are to be conceived only in the context of a relationship *intuitu personae* between the lawyer and his or her client, characterised by the utmost confidentiality.
- 36 First, such a relationship *intuitu personae* between a lawyer and his or her client, which is characterised by the free choice of representative and the relationship of trust that unites the client with their lawyer, renders it difficult to provide an objective description of the quality expected of the services to be provided.

- 37 Second, the confidentiality of the relationship between the lawyer and their client, the purpose of which is, particularly in the circumstances described in paragraph 35 above, both to safeguard the full exercise by individuals of their rights of the defence and to protect the requirement that all persons must have the possibility of consulting their lawyer without constraint (see, to that effect, judgment of 18 May 1982, *AM & S Europe v Commission*, 155/79, EU:C:1982:157, paragraph 18), could be threatened by a requirement for the contracting authority to provide details of the conditions for the award of such a contract and the publicity that must be given to such conditions.
- 38 It follows that, having regard to their objective characteristics, the services covered by Article 10(d)(i) and (ii) of Directive 2014/24 are not comparable with other services included within the scope of application of that directive. Having regard to that objective difference, the EU legislature was also able, in the exercise of its discretion, to exclude those services from the scope of that directive without infringing the principle of equal treatment.
- 39 In the third place, as regards legal services involving activities connected, even occasionally, with the exercise of official authority, covered by Article 10(d)(v) of Directive 2014/24, those activities and, therefore, those services are excluded, under Article 51 TFEU, from the scope of the provisions of the Treaty relating to the freedom of establishment and from those relating to freedom to provide services under Article 62 TFEU. Such services are different from those falling within the scope of the directive in that they directly or indirectly participate in the exercise of public authority and in functions the purpose of which is to safeguard the general interests of the State or other public authorities.
- 40 It follows that, by their very nature, legal services connected, even occasionally, with the exercise of public authority are not comparable, because of their objective characteristics, with the services included in the scope of application of Directive 2014/24. Having regard to that objective difference, the EU legislature was also able, in the exercise of its discretion, to exclude those services from the scope of Directive 2014/24 without infringing the principle of equal treatment.
- 41 Therefore, the examination of the provisions of Article 10(c) and (d)(i), (ii) and (v) of Directive 2014/24 has disclosed no factor of such a kind as to affect their validity having regard to the principles of equal treatment and subsidiarity, and also Articles 49 and 56 TFEU.
- 42 In view of the foregoing considerations, the answer to the question referred is that the examination thereof has disclosed no factor of such a kind as to affect the validity of the provisions of Article 10(c) and (d)(i), (ii) and (v) of Directive 2014/24 having regard to the principles of equal treatment and subsidiarity, and also Articles 49 and 56 TFEU.

Costs

- 43 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:

The examination of the question referred has disclosed no factor of such a kind as to affect the validity of the provisions of Article 10(c) and (d)(i), (ii) and (v) of 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, having regard to the principles of equal treatment and subsidiarity, and also Articles 49 and 56 TFEU.

[Signatures]