



Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

19 June 2019*

(Reference for a preliminary ruling — Public procurement — Directive 2014/24/EU — Article 57(4)(c) and (g) — Award of public service contracts — Optional grounds for exclusion from participation in a procurement procedure — Grave professional misconduct rendering the integrity of the economic operator questionable — Early termination of a prior contract owing to deficiencies in its performance — Legal challenge preventing the contracting authority from assessing the breach of contract until the end of the legal proceedings)

In Case C-41/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunale amministrativo regionale della Campania (Regional Administrative Court, Campania, Italy), made by decision of 22 November 2017, received at the Court on 22 January 2018, in the proceedings

Meca Srl

v

Comune di Napoli,

other parties:

Sirio Srl,

THE COURT (Fourth Chamber),

composed of M. Vilaras, President of the Chamber, R. Silva de Lapuerta, Vice-President of the Court, D. Šváby (Rapporteur), S. Rodin and N. Piçarra, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: R. Schiano, Administrator,

having regard to the written procedure and further to the hearing on 13 December 2018,

after considering the observations submitted on behalf of

- the Comune di Napoli, by A. Andreottola and A. Cuomo, avvocati,
- Sirio Srl, by L. Lentini and C. Sito, avvocati,

* Language of the case: Italian.

- the Italian Government, by G. Palmieri, acting as Agent, and by C. Colelli and C. Pluchino, avvocati dello Stato,
 - the Hungarian Government, by G. Koós, M.Z. Fehér and A. Pokoraczki, acting as Agents,
 - the European Commission, by G. Gattinara, P. Ondrůšek and L. Haasbeek, acting as Agents,
- after hearing the Opinion of the Advocate General at the sitting on 7 March 2019,
gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 57(4) 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 Meca Srl and the Comune di Napoli (Municipality of Naples, Italy) concerning the decision of the Municipality of Naples to authorise Sirio Srl to continue to participate in a call for tenders.

Legal context

EU law

- 3 Recitals 101 and 102 of Directive 2014/24 state:

‘(101) Contracting authorities should ... 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.

Bearing in mind that the contracting authority will be responsible for the consequences of its possible erroneous decision, contracting authorities should also remain free to consider that there has been grave professional misconduct, where, before a final and binding decision on the presence of mandatory exclusion grounds has been rendered, they can demonstrate by any appropriate means that the economic operator has violated its obligations, including obligations relating to the payment of taxes or social security contributions, unless otherwise provided by national law. They should also be able to exclude candidates or tenderers whose performance in earlier public contracts has shown major deficiencies with regard to substantive requirements, for instance failure to deliver or perform, significant shortcomings of the product or service delivered, making it unusable for the intended purpose, or misbehaviour that casts serious doubts as to the reliability of the economic operator. National law should provide for a maximum duration for such exclusions.

In applying facultative grounds for exclusion, contracting authorities should pay particular attention to the principle of proportionality. Minor irregularities should only in exceptional circumstances lead to the exclusion of an economic operator. However repeated cases of minor irregularities can give rise to doubts about the reliability of an economic operator which might justify its exclusion.

(102) Allowance should, however, be made for the possibility that economic operators can adopt compliance measures aimed at remedying the consequences of any criminal offences or misconduct and at effectively preventing further occurrences of the misbehaviour. Those measures might consist in particular of personnel and organisational measures such as the severance of all links with persons or organisations involved in the misbehaviour, appropriate staff reorganisation measures, the implementation of reporting and control systems, the creation of an internal audit structure to monitor compliance and the adoption of internal liability and compensation rules. Where such measures offer sufficient guarantees, the economic operator in question should no longer be excluded on those grounds alone. Economic operators should have the possibility to request that compliance measures taken with a view to possible admission to the procurement procedure be examined. However, it should be left to Member States to determine the exact procedural and substantive conditions applicable in such cases. They should, in particular, be free to decide whether to allow the individual contracting authorities to carry out the relevant assessments or to entrust other authorities on a central or decentralised level with that task.’

4 Article 57 of that directive, entitled ‘Exclusion grounds’, provides:

‘...

4. 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:

...

(c) where the contracting authority can demonstrate by appropriate means that the economic operator is guilty of grave professional misconduct, which renders its integrity questionable;

...

(g) where the economic operator has shown significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract, a prior contract with a contracting entity or a prior concession contract which led to early termination of that prior contract, damages or other comparable sanctions;

...

5. Contracting authorities shall at any time during the procedure exclude an economic operator where it turns out that the economic operator is, in view of acts committed or omitted either before or during the procedure, in one of the situations referred to in paragraphs 1 and 2.

At any time during the procedure, contracting authorities may exclude or may be required by Member States to exclude an economic operator where it turns out that the economic operator is, in view of acts committed or omitted either before or during the procedure, in one of the situations referred to in paragraph 4.

6. Any economic operator that is in one of the situations referred to in paragraphs 1 and 4 may provide evidence to the effect that measures taken by the economic operator are sufficient to demonstrate its reliability despite the existence of a relevant ground for exclusion. If such evidence is considered as sufficient, the economic operator concerned shall not be excluded from the procurement procedure.

For this purpose, the economic operator shall prove that it has paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct, clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities and taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct.

The measures taken by the economic operators shall be evaluated taking into account the gravity and particular circumstances of the criminal offence or misconduct. Where the measures are considered to be insufficient, the economic operator shall receive a statement of the reasons for that decision.

An economic operator which has been excluded by final judgment from participating in procurement or concession award procedures shall not be entitled to make use of the possibility provided for under this paragraph during the period of exclusion resulting from that judgment in the Member States where the judgment is effective.

7. By law, regulation or administrative provision and having regard to Union law, Member States shall specify the implementing conditions for this Article. They shall, in particular, determine the maximum period of exclusion if no measures as specified in paragraph 6 are taken by the economic operator to demonstrate its reliability. Where the period of exclusion has not been set by final judgment, that period shall not exceed five years from the date of the conviction by final judgment in the cases referred to in paragraph 1 and three years from the date of the relevant event in the cases referred to in paragraph 4.'

Italian law

- 5 Article 80(5)(c) of decreto legislativo n. 50 Codice dei contratti pubblici (Legislative Decree No 50 on the Public Procurement Code) of 18 April 2016 (ordinary supplement to GURI No 91 of 19 April 2016; 'the Public Procurement Code') provides:

'The contracting authorities shall exclude an economic operator from participation in the tendering procedure in any of the following situations, which may also concern a subcontractor in any of the cases provided for in Article 105(6), where:

...

- (c) the contracting authorities demonstrate, by appropriate means, that the economic operator has committed grave professional misconduct such as to render its integrity or reliability questionable. Grave professional misconduct shall include: major deficiencies in the performance of a prior public contract or a prior concession contract where those deficiencies have led to the early termination of those contracts that has not been challenged in court or upheld following legal proceedings, to damages or to another comparable sanction; an attempt to influence unduly the decision-making process of the contracting authority or to obtain confidential information with a view to personal gain; the provision, even due to oversight, of incorrect or misleading information capable of influencing the decisions on exclusion, selection or award, or the omission of the information required for the proper conduct of the selection procedure;

...'

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

- 6 The Municipality of Naples issued a call for tenders with a view to awarding a public service contract for school catering for the school year 2017/2018. That contract was divided into 10 lots, each of the lots corresponding to one of the districts in the Municipality of Naples.
- 7 It is apparent from the order for reference that, in the previous school year, Sirio and the Municipality of Naples had entered into a contract for the provision of school catering services in respect of two lots, which was terminated ahead of time in May 2017 on account of food poisoning caused by the presence of coliform bacteria in food served in a school canteen.
- 8 In that regard, after analyses carried out by the Agenzia regionale per la protezione ambientale della Campania (ARPAC) (the Campania Regional Environmental Protection Agency, Italy) on food samples kept by the management of the school in question confirmed the presence of coliform bacteria, in particular in braised beef, the public contract for school catering services in the school year 2016/2017 was awarded to Meca, which had been ranked second at the end of the tendering procedure for the award of that public contract.
- 9 In the context of its participation in the call for tenders referred to in paragraph 6 above, Sirio expressly stated that ‘by decision ... of 29 June 2017, the Municipality of Naples terminated the contract ... of 9 May 2017 early on account of a case of food poisoning’ and that an action contesting that early termination of contract had been lodged with the Tribunale di Napoli (District Court, Naples, Italy).
- 10 On 1 August 2017, the contracting authority authorised Sirio to proceed with its participation in that call for tenders for the lot in respect of which it had submitted a tender. Meca challenged the participation of Sirio in that call for tenders before the Tribunale amministrativo regionale della Campania (Regional Administrative Court, Campania, Italy), without waiting for the Municipality of Naples to adopt a decision awarding the contract at issue in the main proceedings, which it did on 7 November 2017, granting the contract to Sirio.
- 11 Meca takes the view that Sirio should not have been authorised to continue participating in the tendering procedure since its contract with the Municipality of Naples for the provision of school catering services in the school year 2016/2017 had been terminated early by the latter following the food poisoning of pupils and school staff.
- 12 In support of its action before the referring court, Meca complains that the Municipality of Naples did not assess the gravity of Sirio’s breach of its obligations under the public contract to provide school catering services in the school year 2016/2017, despite Article 80(5)(c) of the Public Procurement Code, which entitles the Municipality to demonstrate ‘by appropriate means, that the economic operator has committed grave professional misconduct such as to render its integrity or reliability questionable’. In the view of Meca, the challenge by Sirio before a civil court of the early termination of the contract for the provision of services referred to in paragraph 7 above cannot divest the contracting authority of that power. Thus, in view of the food poisoning which occurred in May 2017, the Municipality of Naples should not have automatically allowed Sirio to participate in the call for tenders at issue in the main proceedings.
- 13 Conversely, both the Municipality of Naples and Sirio consider that the action brought by Sirio before the Tribunale di Napoli (District Court, Naples) prevented the contracting authority from conducting an assessment of the latter’s reliability.

- 14 The referring court notes that the position of the Municipality of Naples and Sirio is not without basis since, according to the case-law of the Italian courts, it can be inferred from Article 80(5)(c) of the Public Procurement Code that a tenderer whose performance of a prior public contract has shown deficiencies must be admitted to a subsequent tendering procedure if it has brought an action, which is still pending, against the early termination of contract which resulted from those deficiencies.
- 15 The referring court considers that EU law may, however, preclude a national provision such as Article 80(5)(c) of the Public Procurement Code. That provision has the effect of rendering ineffective the optional ground for exclusion provided for therein since the contracting authority's discretion is rendered nugatory in the event that litigation is brought against the early termination of a prior contract. Although the Court has not yet had an opportunity to interpret Article 57(4) of Directive 2014/24, it is clear from the Court's case-law relating to 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), a provision repealed by Article 57(4) of Directive 2014/24, that EU law opposes automatic decisions concerning the optional exclusion of tenderers for grave professional misconduct, since such decisions must necessarily take the principle of proportionality into account.
- 16 The referring court submits that, conversely, the principles of proportionality and effectiveness should forbid automatic rules in the event that it is impossible to exclude an economic operator. Therefore, by preventing the contracting authority from conducting a reasoned assessment of the gravity of the professional misconduct giving rise to the early termination of a prior contract on the ground that a challenge to the early termination of that contract has been brought before a civil court, Article 80(5) of the Public Procurement Code infringes those principles and consequently Directive 2014/24. The referring court takes the view that Article 57(4)(g) of that directive does not in any way require a final, and therefore judicial, finding that the contractor was responsible.
- 17 The referring court submits that it is also apparent from the judgment of 13 December 2012, *Forposta and ABC Direct Contact* (C-465/11, EU:C:2012:801), that 'professional misconduct' is a ground for exclusion where it has the characteristics of objective gravity. Under Italian law, the outcome of participation in a call for tenders is subject to an event that is within the control of the contractor alone, namely the decision to bring a legal action against the early termination of a prior contract.
- 18 Lastly, the referring court considers that the Italian legislation is also incompatible with the aims set out in recital 102 of Directive 2014/24, which introduces the mechanism enabling tenderers to take 'compliance measures'. Automatic admission to participate which results from the lodging of a civil action against the early termination of a prior contract discourages undertakings from adopting compliance measures even though these are necessary in order to avoid a recurrence of the conduct which led to that early termination.
- 19 It is in that context that the Tribunale amministrativo regionale della Campania (Regional Administrative Court, Campania) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Do the EU principles of protection of legitimate expectations and of legal certainty, laid down in the [TFEU], and the principles deriving therefrom, such as those of equal treatment, non-discrimination, proportionality and effectiveness, referred to in Directive [2014/24], and the provisions of Article 57(4)(c) and (g) of that directive, preclude the application of a national provision, such as that contained in Article 80(5)(c) of [the Public Procurement Code], according to which challenging before the courts significant deficiencies identified in the performance of a previous procurement contract, which resulted in the early termination of that contract, excludes any assessment by the procuring entity as to the reliability of the tenderer, until a final ruling has been issued in the civil proceedings, when the undertaking concerned has not demonstrated that it has adopted any "self-cleaning" measures in order to remedy the breaches and avoid any repetition of them?'

Question referred for a preliminary ruling

Preliminary observations

- 20 In the first place, it is apparent from the file submitted to the Court that the estimated value of the contract at issue in the main proceedings is EUR 1 127 660 and that consequently it exceeds the threshold of EUR 750 000 laid down in Article 4(d) of Directive 2014/24 for public service contracts for specific services listed in Annex XIV to that directive. It follows that Directive 2014/24 is applicable to the main proceedings and that the question referred by the national court must be understood exclusively in the light of the provisions of that directive.
- 21 In the second place, during the hearing before the Court, the Italian Government claimed that the interpretation of Article 80(5)(c) of the Public Procurement Code provided by the referring court in its request for a preliminary ruling no longer corresponds to the new legal position in Italian law.
- 22 Nevertheless, in a situation where opinions appear to differ as regards the applicable national legislation, it is settled case-law that, in preliminary ruling proceedings brought under Article 267 TFEU, it is not for the Court to specify the relevant provisions of national law applicable to the main proceedings. That is the prerogative of the referring court which, while setting out the internal legal framework, leaves it open to the Court to provide all the criteria for interpreting EU law so as to permit the court making the reference to assess the compatibility of national legislation with EU rules (judgment of 26 June 2008, *Burda*, C-284/06, EU:C:2008:365, paragraph 39).
- 23 In that context, the question referred by the national court must be answered on the basis of the factual and legal circumstances as they appear from the order for reference.

Substance

- 24 By its question, the referring court asks, in essence, whether Article 57(4)(c) and (g) of Directive 2014/24 must be interpreted as precluding a national provision under which the lodging of a legal challenge to a decision adopted by a contracting authority to terminate a public contract early on account of major deficiencies in the performance thereof prevents the contracting authority which issues a further call for tenders from conducting an assessment, at the stage of selecting tenderers, of the reliability of the operator concerned by that early termination.
- 25 In the first place, as the Advocate General noted in point 32 of his Opinion, the wording of Article 57(4) of Directive 2014/24 is sufficiently close to that of Article 45(2) of Directive 2004/18 — a provision which it repealed — for the interpretation sought by the referring court to draw on the case-law of the Court relating to the latter provision.
- 26 Thus, when the Court interpreted the optional grounds for exclusion, such as those provided for in points (d) and (g) of the first subparagraph of Article 45(2) of Directive 2004/18, the only provisions which did not refer to national law, the Court relied on the second subparagraph of Article 45(2) of that directive, under which the Member States were to specify, having regard for EU law, the implementing conditions of paragraph 2, in order to circumscribe more strictly the discretion of the Member States and itself determine the scope of the optional ground for exclusion at issue (see, inter alia, judgment of 13 December 2012, *Forposta and ABC Direct Contact*, C-465/11, EU:C:2012:801, paragraphs 25 to 31).

- 27 In that regard, it is undeniable that Directive 2014/24 restricts the discretion of the Member States. While a reference to national law and regulations was provided for in five of the seven situations referred to in Article 45(2) of Directive 2004/18, now, among the nine situations envisaged in Article 57(4) of Directive 2014/24, only the situation referred to in point (b) of paragraph 4 includes such a reference.
- 28 In the second place, under 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 [situations referred to in that provision]’. Thus, it follows from the wording of that provision that it is the contracting authorities, and not a national court, that have been entrusted with determining whether an economic operator must be excluded from a procurement procedure.
- 29 In the third place, the option available to any contracting authority to exclude a tenderer from a procurement procedure is particularly intended to enable it to assess the integrity and reliability of each of the tenderers, as is apparent from Article 57(4)(c) and (g) and recital 101 of Directive 2014/24.
- 30 As the Advocate General noted in points 42 and 43 of his Opinion, those two grounds for exclusion are based on an essential element of the relationship between the successful tenderer and the contracting authority, namely the reliability of the successful tenderer, on which the contracting authority’s trust is founded. Thus, the first paragraph of recital 101 of Directive 2014/24 states that contracting authorities may exclude ‘economic operators which have proven unreliable’, while the second paragraph of that recital takes into consideration, in the performance of prior public contracts, ‘misbehaviour that casts serious doubts as to the reliability of the economic operator’.
- 31 In the fourth place, under Article 57(5) of Directive 2014/24, contracting authorities must be able to exclude an economic operator ‘at any time during the procedure’ and not only after a court has delivered its judgment, which is additional evidence of the EU legislature’s intention to enable the contracting authority to conduct its own assessment of the acts which an economic operator has committed or omitted either before or during the procurement procedure, in any of the cases referred to in Article 57(4) of that directive.
- 32 Lastly, if a contracting authority were to be automatically bound by an assessment conducted by a third party, it would probably be difficult for it to pay particular attention to the principle of proportionality when applying the optional grounds for exclusion. According to recital 101 of Directive 2014/24, that principle implies in particular that, before deciding to exclude an economic operator, that authority should take into account the minor nature of the irregularities committed or the repetition of minor irregularities.
- 33 It is thus clear, as the Advocate General observed in points 35 and 36 of his Opinion, that the Member States’ discretion is not absolute and that, once a Member State decides to incorporate one of the optional grounds for exclusion provided for in Directive 2014/24, it must respect the essential characteristics thereof, as expressed in that directive. By stipulating that the Member States are to specify ‘the implementing conditions for this Article’ ‘having regard to Union law’, Article 57(7) of Directive 2014/24 prevents Member States from distorting the grounds for exclusion laid down in that provision or ignoring the objectives or principles underlying each of those grounds.
- 34 As has been pointed out in paragraph 28 above, it is clear from the wording of Article 57(4) of Directive 2014/24 that the EU legislature intended to confer on the contracting authority, and on it alone, the task of assessing whether a candidate or tenderer must be excluded from a procurement procedure during the stage of selecting the tenderers.
- 35 It is on the basis of the foregoing considerations that the referring court must be answered.

- 36 As is apparent from the order for reference, Article 80(5)(c) of the Public Procurement Code entitles a contracting authority to exclude from the tendering procedure an economic operator where, inter alia, it establishes, by appropriate means, that: (i) that operator has committed grave professional misconduct such as to cast doubt on its integrity or reliability; (ii) that grave professional misconduct, which may result from major deficiencies in the performance of a prior public contract, has led to the early termination of the contract with the contracting authority, damages or another comparable sanction; and (iii) that early termination has not been challenged in court or upheld following legal proceedings.
- 37 It is clear that a national provision such as Article 80(5)(c) of the Public Procurement Code is not capable of safeguarding the effectiveness of the optional grounds for exclusion laid down in Article 57(4)(c) and (g) of Directive 2014/24.
- 38 The discretion which Article 57(4) of Directive 2014/24 confers on the contracting authority can be hamstrung merely because a candidate or tenderer brings an action challenging the early termination of a prior public contract awarded to it, even though its conduct appeared sufficiently deficient as to warrant that early termination.
- 39 In addition, a rule such as that set out in Article 80(5)(c) of the Public Procurement Code clearly does not encourage a successful tenderer to whom a decision to terminate a prior public contract early is addressed to take corrective measures. To that extent, such a rule is likely to conflict with the requirements of Article 57(6) of Directive 2014/24.
- 40 That directive innovates, in particular by laying down, in Article 57(6), the mechanism for adopting corrective measures ('self-cleaning'). That arrangement, which applies to economic operators which have not been excluded by a final judgment, is designed to encourage an economic operator who is in one of the situations referred to in Article 57(4) of that directive to provide evidence showing that the measures which it has taken are sufficient to demonstrate its reliability despite the existence of a relevant optional ground for exclusion. If such evidence is considered as sufficient, the economic operator concerned must not be excluded from the procurement procedure. For this purpose, the economic operator must prove that it has paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct, clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities and taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct.
- 41 In that regard, the corrective measures emphasise, as the Advocate General observed in point 44 of his Opinion, the importance attached to the reliability of the economic operator, as that factor profoundly influences the grounds for exclusion that relate to the tenderer's subjective characteristics.
- 42 In view of the foregoing, the answer to the question referred must therefore be that Article 57(4)(c) and (g) of Directive 2014/24 must be interpreted as precluding a national provision under which the lodging of a legal challenge to a decision adopted by a contracting authority to terminate a public contract early on account of major deficiencies in the performance thereof prevents the contracting authority which issues a further call for tenders from conducting an assessment, at the stage of selecting tenderers, of the reliability of the operator concerned by that early termination.

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 (Fourth Chamber) hereby rules:

Article 57(4)(c) and (g) 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 must be interpreted as precluding a national provision under which the lodging of a legal challenge to a decision adopted by a contracting authority to terminate a public contract early on account of major deficiencies in the performance thereof prevents the contracting authority which issues a further call for tenders from conducting an assessment, at the stage of selecting tenderers, of the reliability of the operator concerned by that early termination.

[Signatures]