



Reports of Cases

OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 28 January 2021¹

Case C-6/20

Sotsiaalministeerium

v

Innove SA,

intervener:

Rahandusministeerium

(Request for a preliminary ruling
from the Tallinna Ringkonnakohus (Court of Appeal, Tallinn, Estonia))

(Reference for a preliminary ruling – Directive 2004/18/EC – Public procurement – Qualitative selection criteria – Article 2 – Equal and non-discriminatory treatment – Article 26 – Conditions for performance of the contract – Article 46 – Authorisation to pursue a professional activity obtained in another Member State – Regulation (EC) No 852/2004 – Hygiene of foodstuffs – Article 6 – Requirement of a licence or registration certificate from the national food safety authority in the country where the establishment carrying out the supply is located – Time when the licence or registration certificate is submitted to the contracting authority)

1. In Estonia, the law provides that, where special conditions are stipulated for the performance of a public contract, a tenderer must provide evidence that it satisfies those conditions by furnishing, *at the time of submission of the tender*, a licence issued by the authorities of that State or evidence of registration in the appropriate register, failing which the tenderer will be excluded.

2. In 2015 and 2017, the Estonian Ministry of Social Affairs announced procedures for the award of two contracts for the supply of food to disadvantaged persons. Tenderers were required to provide evidence, when they submitted their tenders, that they had obtained an activity licence from the Estonian competent authority or that they were registered in the appropriate national register.

¹ Original language: Spanish.

3. Innove SA, the body responsible for the management of aid financed by European funds,² and the Ministry of Finance disagreed with the Ministry of Social Affairs regarding the compatibility of those conditions with EU law. Since that disagreement was not settled at the administrative stage, the Ministry of Social Affairs, relying on Regulation (EC) No 852/2004,³ brought proceedings in the Estonian courts challenging the decision adopted by Innove, which conflicted with its view.

4. Since the dispute⁴ which has arisen concerns contractual conditions, the court seized of that dispute has submitted a request for a preliminary ruling to which the Court of Justice must respond. It will be necessary to examine, in particular: (a) whether the obligation to furnish national licences or evidence of registration at the same time as the tender constitutes an obstacle to the equal treatment of and freedom of competition among tenderers bidding for public contracts; and (b) whether Directive 2004/18/EC⁵ can be interpreted in a manner that is consistent with the requirements laid down in Regulation No 852/2004.

I. Legal framework

A. EU law

1. Directive 2004/18

5. Pursuant to Article 2 ('Principles of awarding contracts'):

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

6. Article 26 ('Conditions for performance of contracts') reads:

'Contracting authorities may lay down special conditions relating to the performance of a contract, provided that these are compatible with Community law and are indicated in the contract notice or in the specifications. The conditions governing the performance of a contract may, in particular, concern social and environmental considerations.'

7. Article 46 ('Suitability to pursue the professional activity') stipulates:

'Any economic operator wishing to take part in a public contract may be requested to prove its enrolment, as prescribed in his Member State of establishment, on one of the professional or trade

² According to information supplied by the Estonian Government in response to a question from the Court of Justice, Innove was, until 31 March 2020, the national 'implementation unit' for programme 14.1.1 'Fund for European aid to the most disadvantaged persons – purchase and distribution of food'. Several passages of the order for reference state that the supplies of food covered by the contracts were co-financed using European Union structural funds.

³ Regulation of the European Parliament and of the Council of 29 April 2004 on the hygiene of foodstuffs (OJ 2004 L 139, p. 1).

⁴ The dispute could be described as *atypical* because it does not appear that any of the economic operators which participated, or could have participated, in the call for tenders objected to the conditions governing that call for tenders or the final outcome of the procurement procedure. The applicant and the defendants are all organs of the Estonian Government which, in its observations to the Court of Justice, expressed its support for the position of the Ministry of Social Affairs and its opposition to the positions of Innove and the Ministry of Finance. The latter, for its part, suggested at first instance that the appropriate procedure for resolving differences between those organs was that laid down in 'Paragraphs 3 and 4 of the Periodi 2014-2020 struktuuritoetuse seadus (Law on structural aid for the period 2014-2020) and Paragraph 101 of the Vabariigi Valitsuse seadus (Law on the government of the Republic)'.

⁵ Directive 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).

registers or to provide a declaration on oath or a certificate as described in Annex IX A for public works contracts, in Annex IX B for public supply contracts and in Annex IX C for public service contracts.

In procedures for the award of public service contracts, in so far as candidates or tenderers have to possess a particular authorisation or to be members of a particular organisation in order to be able to perform in their country of origin the service concerned, the contracting authority may require them to prove that they hold such authorisation or membership.’

2. Regulation No 852/2004

8. According to Article 2 (‘Definitions’):

‘1. For the purposes of this Regulation:

...

(c) “establishment” means any unit of a food business;

...’

9. Article 6 (‘Official controls, registration and approval’) is worded as follows:

‘1. Food business operators shall cooperate with the competent authorities in accordance with other applicable Community legislation or, if it does not exist, with national law.

2. In particular, every food business operator shall notify the appropriate competent authority, in the manner that the latter requires, of each establishment under its control that carries out any of the stages of production, processing and distribution of food, with a view to the registration of each such establishment.

Food business operators shall also ensure that the competent authority always has up-to-date information on establishments, including by notifying any significant change in activities and any closure of an existing establishment.

3. However, food business operators shall ensure that establishments are approved by the competent authority, following at least one on-site visit, when approval is required:

(a) under the national law of the Member State in which the establishment is located;

(b) under Regulation (EC) No 853/2004;

or

(c) by a decision adopted by the Commission. That measure, designed to amend non-essential elements of this Regulation, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 14(3).

Any Member State requiring the approval of certain establishments located on its territory under national law, as provided for in subparagraph (a), shall inform the Commission and other Member

States of the relevant national rules.’⁶

B. Estonian law

1. Riigihangete seadus⁷

10. Paragraph 39(1) provides:

‘The contracting authority must examine whether the economic and financial standing and the technical and professional ability of the tenderer or candidate meet the conditions relating to qualification set out in the tender notice. The conditions relating to qualification must be sufficient to establish the tenderer or candidate’s suitability to perform the public contract and must also be relevant and proportionate in the light of the nature, quantity and objective of the goods, services or works covered by the public contract.’

11. Paragraph 41(3) provides:

‘Where the legislature lays down specific conditions for an activity which must be carried out under a public contract, the contracting authority shall indicate in the tender notice the specific conditions which must be met, in addition to the registration certificates and operating licences required for qualification of the tenderer or candidate. In order to verify compliance with the specific conditions laid down in the statutory provisions, the contracting authority shall stipulate in the tender notice that the tenderer or candidate must furnish proof that it holds an operating licence or registration certificate or that it fulfils any other specific condition, or that the tenderer must prove that it is a member of a competent organisation in accordance with the legislation of its State of establishment, unless the contracting authority is able to obtain that proof, without any further expenditure, by consulting the public data on a database. If the tenderer or candidate does not hold an operating licence or registration certificate, or is not a member of the competent organisation in accordance with the legislation of its State of establishment, the contracting authority shall exclude it.’

2. Toiduseadus⁸

12. In accordance with Paragraph 8 (‘Obligation to hold a licence’):

‘(1) The economic operator must hold an operating licence for activities in the food sector in the following establishments:

(1) an establishment for the purposes of Article 6(3)(b) and (c) of Regulation [No 852/2004];

⁶ Points (b) and (c) of paragraph 3 were worded, respectively, in accordance with the Corrigendum to Regulation (EC) No 852/2004 of the European Parliament and of the Council of 29 April 2004 on the hygiene of foodstuffs (OJ 2004 L 226, p. 3) and Regulation (EC) No 219/2009 of the European Parliament and of the Council of 11 March 2009 (OJ 2009 L 87, p. 109).

⁷ Law on public procurement (‘the RHS’) in the version in force until 31 August 2017 (RT I of 25 October 2016, 20).

⁸ Law on foodstuffs (‘the ToiduS’) (RT I 1999, 30, 415).

- (2) an establishment in which operations relating to primary products of animal origin do not involve any alteration of the form or original characteristics of the products, unless the establishment concerned is one which deals with the primary production of those products and in which the producer carries out associated operations within the meaning of Regulation [No 852/2004];
- (3) an establishment in which operations relating to primary products not of animal origin involve the alteration of the form and original characteristics of the products, unless the establishment is one referred to in Annex II, Chapter III of Regulation [No 852/2004];
- (4) an establishment in which the processing of foodstuffs takes place, in particular the preparation and wrapping of foodstuffs, with the exception of the wrapping of primary products not of animal origin or where the establishment is one referred to in Annex II, Chapter III of Regulation [No 852/2004];
- (5) an establishment which deals with operations relating to foodstuffs of animal origin which are then distributed to another operator and are included in Annex II, Chapter III of Regulation [No 852/2004];
- (6) an establishment dealing with the storage of foodstuffs which, in order to ensure food safety, must be kept at a temperature other than ambient temperature;
- (7) an establishment dealing with retail trade, in particular in foodstuffs which must be stored at a temperature other than ambient temperature in order to ensure food safety, unless the establishment is one referred to in Annex II, Chapter III of Regulation [No 852/2004];

...

- (2) The operating licence shall entitle the economic operator to commence operations and to pursue and carry out an economic activity in the establishment or in the part of the establishment referred to in the operating licence.
- (3) The competent minister in the field shall establish, by regulation, a detailed list of the areas of operation and categories of foodstuff in respect of which operators must be in possession of an operating licence.'

13. Paragraph 10 reads:

'An operating licence shall be granted to an economic operator if its establishment or the establishment which it uses for its activity as a food sector operator satisfy the conditions laid down in [Regulation No 852/2004 and Regulation No 853/2004, and] in other relevant provisions on foodstuffs.'

II. Facts, national proceedings and questions referred for a preliminary ruling

14. In 2015 and 2017, the Estonian Ministry of Social Affairs announced two open invitations to tender for public contracts (Nos 157505 and 189564) for the supply of ‘food aid for the most disadvantaged’. Each of the invitations to tender was for a value of more than EUR 4 million.⁹

15. In accordance with tender notice No 157505, tenderers were required to have the approval of the Veterinaar- ja Toiduamet (Veterinary and Food Office, ‘VFO’) and to provide the corresponding certificate and approval number.

16. The conditions of contract No 157505 were amended during the tendering procedure, to the effect that it would be sufficient to attach a declaration of compliance with the obligations relating to information and approval laid down in the ToiduS. The same amendment was stipulated for contract No 189564.

17. As a result of both procedures, two framework agreements were concluded with three tenderers. Finally, Sanitex OÜ (Estonian subsidiary of UAB Sanitex, the parent company established in Lithuania) was awarded the contract on the grounds that it submitted the most economically advantageous bid in the *mini competition* held in the context of the framework agreements.

18. Purchases made under the contracts were of foodstuffs from Estonia, Latvia, Lithuania and other European Union Member States.

19. In the performance of its duties, Innove, by a ‘financial correction decision’ of 30 October 2018,¹⁰ rejected the requests for payment (in the amount of EUR 463 291.55) submitted by the Ministry of Social Affairs as a result of those contracts.

20. The financial correction decision was based on the failure of the Ministry of Social Affairs to fulfil the obligation to comply with the provisions of the RHS.¹¹

21. Innove took the view that, in the case of both public contracts, selection criteria had been applied which unduly restricted the circle of tenderers, in particular foreign tenderers. The unreasonable restriction resided, in its view, in the fact that the tenderers were required to have a licence from the Estonian authority or to comply with the registration obligation in Estonia.

22. According to Innove, the possibility that foreign tenderers could have satisfied those requirements by relying on the resources of another person or by submitting a joint tender with an undertaking which satisfied the requirements did not prevent the undue restriction of the circle of tenderers, by discouraging them from participating in the tendering procedure.

23. The Ministry of Social Affairs filed a (optional) complaint against the financial correction decision, which Innove dismissed on 25 January 2019.

⁹ There are no details regarding when the 2017 procedure was commenced but the referring court does not hint at the possibility of applying 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).

¹⁰ ‘The financial correction decision’.

¹¹ That obligation flowed from the Perioodi 2014-2020 struktuuriabie seadus (Law on structural aid for the period 2014-2020).

24. The Ministry of Social Affairs brought an action against that dismissal decision before the Tallinna Halduskohus (Administrative Court, Tallinn, Estonia), seeking its annulment. It submitted in short that:

- The tender notices were lawful because they did not confer any discretion to determine the stage of the procedure at which the activity licence requirement had to be satisfied.
- The specific requirements complied with the law and were the same as the requirements of registration and approval laid down by Article 6 of Regulation No 852/2004.
- The contested decision wrongly took the view that the contracting authority could not require an activity licence pursuant to Article 46 of Directive 2004/18. Since the activity involved the physical handling of foodstuffs in Estonia, the contractor or the warehouse used by it under contracts or subcontracts must hold an activity licence issued by the VFO. Foodstuff-handling licences are not mutually recognised by the Member States.
- It was not possible for the contracting authority to admit a tenderer who only had an activity licence from the State in which it was established. Moreover, the tenderer had sufficient time to deal with the licensing procedure in Estonia.

25. Innove opposed the action brought by the Ministry of Social Affairs, claiming that:

- Although a literal interpretation of Paragraph 41(3) of the RHS allowed the contracting authority to require the tenderer to produce the activity licence or registration certificate required under Estonian law to demonstrate compliance with the specific requirements, that requirement must be interpreted in the light of the provisions of EU law (in particular, Directive 2004/18) and the case-law.
- The condition stipulating that tenderers had to comply with the specific requirements of Estonian law at the time of submission of a tender is incompatible with the principle of equal treatment laid down in Paragraph 3(3) of the RHS.
- According to the case-law of the Court of Justice, the principle of equal treatment of tenderers precludes the introduction of conditions for participation in a tendering procedure which require tenderers to have knowledge of the practice of the State in which the contracting authority is established.¹²
- There should have been an assessment as to whether, in the light of the condition at issue, the tenderers who had previously provided services in another Member State and the tenderers who had previously carried out activities relating to foodstuffs in Estonia were in the same situation.

¹² Innove relied, in that connection, on the judgments of 14 December 2016, *Connexion Taxi Services*, C-171/15, EU:C:2016:948, paragraph 42, and of 2 June 2016, *Pizzo*, C-27/15, EU:C:2016:404, paragraphs 45, 46 and 51.

26. The Ministry of Finance intervened in the proceedings in support of Innove's position. In its submission, the selection criteria in the tender notice were unduly restrictive. The Ministry of Finance argued, in particular, that:

- Foreign tenderers who do not carry on their activity in Estonia have to comply with the requirements of the State in which they operate and are subject to the supervision of the competent authority of the State in which they are established.
- The requirement to be registered or hold a licence is a requirement of EU law which applies throughout the Union.
- In order for the restriction to be proportionate in relation to foreign tenderers and at the same time to provide the contracting authority with the assurance that it was not dealing with an illegal operator, the contracting authority should have allowed them to submit an equivalent licence or certificate issued by the State in which they were established or by another competent authority. It was possible for a foreign tenderer to have been required to comply with the requirements arising under Estonian law and necessary for the performance of the contract only during performance of that contract.

27. By judgment of 22 May 2019, the Tallinna Halduskohus (Administrative Court, Tallinn) dismissed the action, finding, in summary, that:

1. The requirement at issue creates unequal treatment of foreign tenderers who, where they have not previously operated in Estonia, cannot comply with the registration and licence obligation at the time of submission of a tender.
2. Estonian tenderers who have been able to gain previous experience, by carrying out an activity in Estonia, are in a better position when compared with other economic operators having similar experience in other Member States.¹³
3. The obligation of tenderers to apply for a licence to operate as a food business operator at the same time as preparing the tender is disproportionate.
4. The licence application provided for in the ToiduS requires, inter alia, notification of a specific activity which is subject to approval and an indication of capacities. First, that information is not available at the time of submission of a tender because the tenderer still does not know whether its tender will be accepted and is unaware of the volumes that it must take into account. Second, it is not the aim of that law to require that a licence must be applied for in respect of hypothetical activities, in addition to which it may not be possible to apply for a licence for reasons related to timing.

¹³ The Tallinna Halduskohus (Administrative Court, Tallinn) referred to the *Public procurement guidance* drawn up by the Commission (https://ec.europa.eu/regional_policy/sources/docgener/guides/public_procurement/2018/guidance_public_procurement_2018_en.pdf). The current version of that guidance includes as an example of a discriminatory selection criterion the obligation to 'already [have] qualifications/professional certificates recognised in the country of the contracting authority at the time of submission of tenders, as this would be difficult for foreign tenderers to comply with in such a short timeframe'.

28. The Ministry of Social Affairs brought an appeal against the judgment at first instance before the Tallinna Ringkonnakohus (Court of Appeal, Tallinn, Estonia), which, in its order for reference, sets out, *inter alia*, the following considerations:

1. The dispute concerns the determination of whether it was possible to impose, as a condition for participating in the procurement procedure, the requirement that tenderers must already have a licence issued by an Estonian authority in accordance with the ToiduS or must have complied with the registration obligations in Estonia.
2. Such conditions, laid down in Regulation No 852/2004, were introduced with a view to guaranteeing food safety. Since the conditions regarding certification or approval by the competent authority in order to commence the pursuit of an activity in a Member State other than the State of origin are not fully harmonised, an economic operator cannot rely on a licence issued by his State of origin and instead must obtain a new licence or registration certificate issued by the Member State of the place of business.
3. Performance of the contract could be compromised if a tenderer qualifies on the basis of its undertaking to apply for an operating licence or registration and that tenderer fails to fulfil that obligation or is unable to carry out its activity in accordance with the criteria for obtaining a licence or registration. In that case, the contracting authority would have to launch a new tendering procedure.
4. It is essential to determine whether the guarantee of food safety and the needs relating to attainment of the objectives of public contracts justify the imposition of a restriction on foreign tenderers which, before submitting their tenders, have to apply for and obtain the required licence or registration or have to submit a joint tender with a company that already holds an operating licence or is registered in Estonia.
5. Although such a requirement may be disproportionate as regards foreign tenderers, the interpretation of Article 46 of Directive 2004/18 is not so obvious and is, moreover, a provision which the Court of Justice has not yet had occasion to interpret.

29. Against that background, the Tallinna Ringkonnakohus (Court of Appeal, Tallinn) has referred the following questions to the Court of Justice for a preliminary ruling:

- ‘(1) Are Articles 2 and 46 of Directive 2004/18/EC ... to be interpreted as precluding national legislation – such as Paragraph 41(3) of the [RHS] – pursuant to which, if specific requirements for the activities to be carried out under a public contract are laid down by law, the contracting authority must specify in the tender notice which registrations or activity licences are required to qualify the tenderer, must require the tenderer to submit evidence of the activity licence or registration for the purpose of verifying compliance with the special statutory requirements in the tender notice, and must refuse the tenderer as unqualified if the latter does not possess the relevant activity licence or registration?
- (2) Read together, are Articles 2 and 46 of Directive 2004/18/EC ... to be interpreted as precluding the contracting authority, in the case of a food aid procurement contract that exceeds the international threshold, from setting a selection criterion for the tenderers according to which all tenderers, irrespective of where they were previously established,

must already hold an activity licence or be registered in the country of the food aid operations at the time of submission of the tenders, even if the tenderer has not previously been established in that Member State?

(3) If the preceding questions are answered in the affirmative:

- (1) Are Articles 2 and 46 of Directive 2004/18/EC ... to be regarded as provisions that are so unambiguous that the principle of the protection of legitimate expectations cannot be invoked against them?
- (2) Are Articles 2 and 46 of Directive 2004/18/EC ... to be interpreted as meaning that a situation in which the contracting authority in a public tender for food aid requires, pursuant to the national law on foodstuffs, that the tenderers already hold an activity licence at the time of submission of the tender may be regarded as constituting a manifest infringement of the rules in force, as negligence or as an irregularity precluding reliance on the principle of the protection of legitimate expectations?

III. Procedure before the Court of Justice

30. The order for reference was received at the Registry of the Court on 7 January 2020.

31. Written observations were lodged by the Estonian Government and the European Commission. Those parties, together with the Riigi Tugiteenuste Keskus (Centre for State Aid Services, Estonia), a body which has partly taken over Innove's functions, gave written responses to the questions addressed to them by the Court of Justice, in place of a hearing.

IV. Assessment

A. Preliminary remarks

32. At the Court's request, I shall confine myself to examining the first two questions referred for a preliminary ruling.

33. The referring court's questions concern, essentially, whether Articles 2 and 46 of Directive 2004/18 preclude national provisions in accordance with which the contracting authority has imposed, in respect of two public contracts for the purchase and distribution of food aid to the most disadvantaged, the conditions at issue for the purposes of assessing whether tenderers qualify.

34. By means of those conditions, the contracting authority required tenders to submit, at the same time as their tenders, evidence that they held an activity licence issued in Estonia or that they were registered for that purpose in that country. According to the Estonian Government, those requirements are derived from Paragraph 41(3) of the RHS.¹⁴

¹⁴ Paragraph 10 of its written observations.

35. The tender specifications for contract No 157505 reflected that provision, stipulating that tenderers should hold a licence in Estonia and that they should attach to their tenders the relevant certificate and licence number. However, that condition was relaxed by acceptance that a simple declaration of compliance with the information and approval obligations could be attached. For the purposes of contract No 189564, fulfilment of the latter condition was sufficient from the outset.

36. It can be inferred from the parties' observations and from the order for reference that, by acting in that way, the contracting authority was seeking to comply with Article 6 of Regulation No 852/2004: it originally requested the approval required under paragraph 3 thereof and later simply required compliance with the less stringent requirements of paragraph 2, which amount to a number of obligations to provide information.

37. As I shall explain in more detail, the premiss for those two paragraphs of Article 6 of Regulation No 852/2004 is that foodstuff operators must have an establishment in the territory of the State in which the competent authority performs its public functions.

38. In that connection, it can be deduced that the contracting authority stipulated that tenderers must have an establishment in Estonia (and must also hold an activity licence or be registered in the applicable registers in that country).

39. Since the order for reference does not explain the terms of the tendering procedure in detail, it would be possible to examine the clauses at issue from a different perspective if, in fact, the tender specifications permitted food supplies to be offered from establishments located outside Estonia.¹⁵

40. In those circumstances, Regulation (EC) No 178/2002,¹⁶ the primary objective of which is to ensure the free movement of safe and wholesome food in the European Union, could be applicable. The same objective can also be found among those proposed by Regulation No 852/2004, with which it is connected.¹⁷

41. If the tender specifications did not require tenderers to have an establishment in Estonia, it would have to be assumed that tenders from those economic operators could be based on the supply of food from outside Estonia, a point which it is for the referring court to verify.¹⁸

42. On the other hand, if the tender specifications required all tenderers to have an establishment in Estonia, from which to carry out the supply of food,¹⁹ it would be necessary to assess whether that requirement was properly justified and, if so, whether it went beyond what was needed in order to achieve the aims pursued. That would also be a task which would fall to the national court.

¹⁵ In its observations (paragraph 2), the Commission points out that 'the reasons on which the need for an establishment situated in Estonia is based cannot be clearly inferred from the request for a preliminary ruling'.

¹⁶ Regulation of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety (OJ 2002 L 31, p. 1).

¹⁷ See, in particular, recitals 16, 17 and 20 of Regulation No 852/2004.

¹⁸ The Estonian Government's replies to the Court's questions create further confusion on this point. It states (paragraph 10) that 'the contracting authority conceived the provision of services on the basis of a food business model which probably requires an establishment on national territory. The contracting authority accepts that, even though it did not assume this and no tender in that sense was submitted, although unlikely, it is not possible to rule out completely that, in its financial and operational model, a tenderer would envisage providing services in another way, that is, *without having an establishment on national territory*'. Italics added.

¹⁹ According to the order for reference (paragraph 3), the Ministry of Social Affairs claimed before the first-instance court that 'it is not possible to perform the contract without using an intermediate warehouse or a means of transport situated in Estonia. Since the successful tenderer cannot perform the contract without storing foodstuffs, it has the status of food sector undertaking'.

43. In that second scenario, were the referring court to find that the obligation to have an establishment in Estonia was unjustified or disproportionate, the Ministry of Social Affairs may have breached Article 2 of Directive 2004/18, in that it discriminated against operators with their headquarters in other Member States but without an establishment in Estonia.

44. The considerations I shall set out below are based on the premiss that the contract documents required, tacitly or expressly, that tenderers must have an establishment in Estonia, which will lead to an examination of the application of Article 6(2) and (3) of Regulation No 852/2004, in conjunction with Directive 2004/18.

B. Questions 1 and 2

45. I believe that it is appropriate to answer the two questions together in view of their connection. My reply will be developed in three stages: (a) the qualification of tenderers; (b) the requirement that tenderers must have an establishment for handling foodstuffs in Estonia; and (c) the lawfulness of the requirements at issue if they must be satisfied during performance of the contract and not at the beginning of the procedure.

1. Qualification of tenderers

46. The order for reference stresses that the conditions at issue in the dispute concerned the ‘qualification’ of tenderers. The Estonian Government confirms this, pointing out that ‘they are linked to the figure of the tenderer itself and can be likened to a qualifying condition’.²⁰

47. That is clearly reflected in the first question: under the national provisions, the contracting authority must specify in the tender notice the ‘registrations or activity licences ... required’ for *qualification* of the tenderer. If, when submitting its tender, the tenderer fails to provide evidence that it had either, the contracting authority would categorise it as *not qualified* (and would, therefore, reject it).

48. The second question is worded similarly: now the query is whether Articles 2 and 46 of Directive 2004/18 preclude the contracting authority from requiring, as a condition for *qualification* of tenderers, that, ‘irrespective of their previous place of business’, tenderers must hold ‘an activity licence or be registered in the State in which the food aid is granted at the time of submission of their tender’.

49. Expressed in that way, it is striking that both questions refer to Article 46 of Directive 2004/18. In accordance with Article 44 of the directive, when verifying the *suitability* of economic operators participating in procurement procedures, those excluded under Article 46 (and Article 45) must be eliminated.

50. Article 46 of Directive 2004/18 merely governs the ‘suitability to pursue the professional activity’, which is required of economic operators. That suitability is subjective and is linked to the professional status of an economic operator wishing to participate in a procurement procedure. As a consequence, such an operator may be required to demonstrate its professional suitability by producing the documents referred to in Article 46.

²⁰ Paragraph 12 of its written observations.

51. Scrutiny of Article 46 of Directive 2004/18 in conjunction with recital 42 thereof²¹ reveals that, at the stage when tenderers are selected, the principle of mutual recognition applies for the purpose of confirming professional suitability:

- In accordance with the first paragraph of Article 46, any economic operator wishing to take part in a public contract may be requested to provide evidence of ‘its enrolment, as prescribed in his Member State of establishment, on one of the professional or trade registers or to provide a declaration on oath or a certificate.’
- In the same vein, albeit only in relation to public service contracts, the second paragraph states that, ‘in so far as candidates or tenderers have to possess a particular authorisation or to be members of a particular organisation in order to be able to perform in their country of origin the service concerned, the contracting authority may require them to prove that they hold such authorisation or membership.’

52. It follows from those provisions that a tenderer can prove that it qualifies (is subjectively suitable to perform a public contract) by relying on documents issued by the competent authorities of the Member State in which it is located.

53. Other provisions of Directive 2004/18, included in the same section, ‘Criteria for qualitative selection’, take the same line:

- Under Article 48(2)(d), an economic operator can provide evidence of its technical or professional ability by sending to the contracting authority of the State of performance of a public contract documents drawn up by the competent authorities of the Member State in which it is established.
- Article 49 applies the same criterion in relation to ‘Quality assurance standards’.
- In accordance with Article 52(3), ‘certified registration on official lists by the competent bodies or a certificate issued by the certification body shall not, for the purposes of the contracting authorities of other Member States, constitute a presumption of suitability’ except as regards, *inter alia*, Article 46 of the directive. The second subparagraph of Article 52(5) provides that contracting authorities are to recognise ‘equivalent certificates from bodies established in other Member States’.

54. Those positive stipulations are reinforced by a number of limitations imposed on contracting authorities:

- Article 52(4) of Directive 2004/18 provides that ‘information which can be deduced from registration on official lists or certification [as referred to in Article 52(3)] may not be questioned without justification’.
- As regards ‘any registration of economic operators of other Member States in an official list or for their certification by [competent] bodies’, Article 52(5) of Directive 2004/18 provides, with particular intensity, that ‘no further proof or statements can be required other than those requested of national economic operators’, adding that ‘economic operators from other

²¹ ‘The relevant Community rules on mutual recognition of diplomas, certificates or other evidence of formal qualifications apply when evidence of a particular qualification is required for participation in a procurement procedure or a design contest.’

Member States may not be obliged to undergo such registration or certification in order to participate in a public contract.’

55. Article 46 of Directive 2004/18 requires, therefore, that when an assessment is made of the professional suitability of a tenderer from another Member State, that tenderer must be placed on an equal footing with a national tenderer which has an equivalent level of suitability.

56. Where a tenderer demonstrates, using one of the methods provided for in Directive 2004/18, that it qualifies as necessary in another Member State, proof of this must suffice for the contracting authority to consider that the hurdle of professional suitability has been cleared.

57. In short, Article 46 of Directive 2004/18 is to be interpreted as meaning that a contracting authority cannot impose, as a qualifying criterion (that is, a qualitative selection criterion), the requirement that a registration certificate or licence must be obtained in the Member State of performance of the contract if a tenderer already has similar approval in the Member State where it is established.

58. In so far as the tender specifications at issue in these proceedings (or, as the case may be, the national provisions with which they comply) created, for the purposes of verifying the suitability of tenderers with authorisation in another Member State, the obligation to obtain *further*, similar authorisation in Estonia, those tender specifications are incompatible with Article 46 of Directive 2004/18.

59. On that basis, it is necessary to ascertain whether the application of Regulation No 852/2004 is liable to affect that interpretation of Article 46 of Directive 2004/18. That could occur if the conditions imposed on tenderers concerned their specific presence, by means of a particular establishment, in the Member State of the contracting authority which stipulated those conditions, rather than their (subjective) *qualification* as authorised economic operators.

60. The Estonian Government refers to Regulation No 852/2004 (Article 6(3)(a)) in support of its claim that it is entitled to require tenderers to have a ‘licence for the *storage* of foodstuffs’. In particular, the Estonian Government asserts that an economic operator must be the ‘holder of an activity licence in the food sector *for the establishment where foodstuffs are stored* which ... must be kept at a temperature other than ambient temperature’.²²

2. Requirement that tenderers must have an establishment for the handling of foodstuffs in Estonia

61. As I have already pointed out, in the absence of further details in the order for reference, it must be assumed that the contract documents required tenderers to have an establishment in Estonia.

62. Article 6 of Regulation No 852/2004 is based on a territorial link between the establishment in which the food business activity is pursued and the Member State in which it is located.

63. By virtue of that territorial link, as far as that establishment is concerned, the competent authority with control over the stages of production, processing and distribution of food must, of necessity, be that of the Member State where the establishment is located.

²² Observations of the Estonian Government, paragraph 19. No italics in the original.

64. The corollary of that rule is that the obligation to have an establishment which is authorised or registered in Estonia also applies to food businesses with professional qualifications issued in another Member State. That is the only way of ensuring that the *control of activities carried out in an establishment* situated in Estonia is performed by the authorities of that country.

65. The requirement that undertakings which have establishments for the production, processing and distribution of food in a Member State must be registered in that Member State or have a licence issued by the authorities of that Member State therefore complies, in principle, with EU law.

66. Difficulties arise when it comes to reconciling that rule with the provisions of EU law governing public procurement. In accordance with those provisions, contracting authorities:

- Must, on the one hand, abolish restrictions on competition and ‘treat economic operators equally and non-discriminatorily’ (Article 2 of Directive 2004/18), ensuring that the fundamental freedoms laid down in the FEU Treaty are respected.
- May not, on the other hand, disregard the other mandatory EU provisions: in so far as is relevant for the present purposes, those adopted in the field of public health and, more specifically, the hygiene of foodstuffs. Recital 6 of Directive 2004/18 reads: ‘Nothing in this Directive should prevent the imposition or enforcement of measures necessary to protect ... health [and] human ... life ..., provided that these measures are in conformity with the Treaty.’

67. I believe that it is possible to overcome the apparent conflict²³ between the general rules on public contracts and the specific rules on food hygiene. Where compliance with the latter rules is compulsory, those rules must take precedence over the general rules on public contracts, as set out in recital 6 of Directive 2004/18. The specific rules must be applied in a way which has the minimum possible impact on the general principles of EU law on public contracts.

68. At this juncture, when addressing how the requirements imposed by the specific rules on food hygiene are applied in the procurement procedure (provided, I repeat, that they are mandatory under Regulation No 852/2004), it may be helpful to identify the time when the tenderer is required to furnish the licence relating to its establishment or a declaration that it is registered as the owner of that establishment.

69. I agree with the referring court’s assertion that ‘the requirements imposed in this case, in the interests of food safety’, are justified as ‘conditions for the performance of a public contract’ and that ‘the dispute concerns only the question of when the tenderer was required to fulfil those conditions – when the tender was submitted or when the contract was being performed’.²⁴

²³ This is not the first time that the Court has been faced with such a situation. The judgment of 8 June 2017, *Medisanus*, C-296/15, EU:C:2017:431, paragraph 79, stated that ‘the contracting authority is subject to two *potentially conflicting* requirements ... Indeed, the contracting authority must comply with Article 6 of the Law on medicinal products, which lays down the principles of priority supply and national self-sufficiency ... At the same time, the contracting authority must, pursuant to Article 2 of Directive 2004/18, afford equal access to public procurement and, accordingly, ensure non-discriminatory treatment of economic operators that have medicinal products derived from plasma.’ No italics in the original.

²⁴ Paragraph 15 of the order for reference.

3. Time when the tenderer must provide evidence that it has an administrative licence relating to its establishment or that it is registered as the proprietor of that establishment.

70. Having regard solely to the need to ensure that the right contractor is selected, the optimal time for furnishing those documents may be the time when tenders are submitted. Proof that a tenderer has an establishment which is covered by a licence or which is entered in the appropriate register assists the contracting authority to establish at the outset whether a tenderer will be able to comply with its (future) contractual obligations.

71. In *CoNISMa*,²⁵ the Court held that the harmonisation of the directives on procurement was also carried out in the interests of contracting authorities. It thus drew attention to the position of the public procuring entity, which is required to uphold the general interest.²⁶

72. However, like others before and after it, the judgment also pointed out that ‘one of the primary objectives of Community rules on public procurement is to attain the widest possible opening-up to competition ... and that it is the concern of Community law to ensure the widest possible participation by tenderers in a call for tenders’.²⁷ That objective is also beneficial to the contracting authority, which will have more criteria at its disposal when it chooses the successful tenderer.²⁸

73. The Estonian Government and the Commission have put forward opposing views on that point.

74. In the Estonian Government’s submission, if the obligation of registration or approval were classified as a condition relating to performance and not a qualitative selection criterion, the successful tenderer might ultimately not be in a position to perform the contract. That eventuality would increase the contracting authority’s workload and the duration of the procedure needed for signature of the contract.²⁹ Moreover, any economic operator has the right to submit a joint tender with an entity which has already satisfied the prerequisites of approval and registration.³⁰

75. The Commission draws attention to proper observance of the principle of equality and non-discrimination as regards the treatment of economic operators.³¹ The Commission maintains, contrary to the view of the Estonian Government, that the obligation to obtain approval or registration as a condition for participating in the tendering procedure will be compatible with the principles of non-discrimination and proportionality only if no less restrictive measure exists. The possibility of establishing the obligation of approval or registration as a performance condition is precisely one such less restrictive measure.³²

²⁵ Judgment of 23 December 2009, C-305/08, EU:C:2009:807.

²⁶ The interests of the contracting authority and the effectiveness of the actions of the administrative authority were taken into account in, inter alia, the judgment of 15 May 2008, *SECAP and Santorso*, C-147/06 and C-148/06, EU:C:2008:277.

²⁷ Judgment of 23 December 2009, *CoNISMa*, C-305/08, EU:C:2009:807, paragraph 37.

²⁸ *Ibid.*, paragraph 37: ‘the widest possible opening-up to competition is contemplated not only from the point of view of the Community interest in the free movement of goods and services but also the interest of the contracting authority concerned itself, which will thus have greater choice as to the most advantageous tender which is most suitable for the needs of the public authority in question’.

²⁹ Paragraph 14 of its written observations.

³⁰ Paragraph 15 of its written observations.

³¹ Paragraph 19 of its written observations.

³² Paragraph 20 of its written observations.

76. My view, which essentially coincides with that of the Commission on this point, is that the arguments set out by the first-instance court,³³ and the arguments of the Ministry of Finance³⁴ and Innove³⁵ transcribed above, draw attention to the fact that requiring approval or registration at the classification stage creates, for food undertakings not located in Estonia, a disproportionate obstacle which, without the relevant justification, restricts their access to public procurement procedures like that at issue in this case. To the same extent, it unfairly reduces the circle of potential tenderers, in particular, foreign tenderers.

77. A restriction of that nature is possible only if the objective it pursues ‘could not be achieved by ... restrictions of lesser extent or having less effect on intra-Community trade’.³⁶

78. In order to reconcile the requirements of Directive 2004/18 with the need for establishments handling food in Estonia to have approval or be registered, within the meaning of Article 6 of Regulation No 852/2004, the requirements at issue could be framed as ‘special conditions relating to the performance of a contract’, as referred to in Article 26 of Directive 2004/18.

79. The case-law has paid attention those special conditions in situations where they were imposed as a result of ‘social ... considerations’, thus focusing on some of those covered by the open wording of the last part of Article 26 of Directive 2004/18.³⁷ There is no reason why they should not be extended to other areas, since the reference to ‘social and environmental considerations’ is given merely as an example (‘in particular’).

80. Therefore, there is nothing to preclude the conditions relating to performance of a contract for the supply of foodstuffs from including requirements derived specifically from the application of the EU provisions on food hygiene or those of the Member State concerned.

81. It will be sufficient to stipulate that those requirements must be satisfied at a later time and independently of the assessment of whether a tenderer whose professional authorisation was granted in another Member State satisfies the qualifying criteria.

82. Accordingly, the principle of equal treatment would apply in harmony with the principle of opening up to competition as far as possible, because all tenderers would be given a genuine opportunity to win the contract without undermining the application of the provisions of EU law on food hygiene. Otherwise, an excessive advantage in favour of national food-sector operators would be established.

83. In accordance with that scheme, operators who already have a national licence or are registered as food-handling establishments in Estonia would be able to submit their licence or registration certificate with their tenders; the remaining tenderers would have to undertake to obtain a licence or registration if they were awarded the contract.

84. There is certainly some merit to the Estonian Government’s objection (if it was necessary to wait until the of performance stage of the contract, there would be a risk that the procedure would be deemed to have failed if the successful tenderer did not ultimately obtain a licence

³³ Point 27 of this Opinion.

³⁴ Point 26 of this Opinion.

³⁵ Point 25 of this Opinion.

³⁶ Judgment of 11 September 2008, *Commission v Germany*, C-141/07, EU:C:2008:492, paragraph 50 and the case-law cited.

³⁷ Judgments of 18 September 2014, *Bundesdruckerei*, C-549/13, EU:C:2014:2235; of 17 November 2015, *RegioPost*, C-115/14, EU:C:2015:760; and of 27 November 2019, *Tedeschi and Consorzio Stabile Istant Service*, C-402/18, EU:C:2019:1023.

or registration). However, the aim of ensuring that the procedure does not fail cannot override the essential principles of public procurement, in particular the principles of ensuring that tenderers can access public procurement procedures on an equal basis without being faced with unjustified obstacles.

85. Moreover, there is nothing to suggest that an undertaking which deals professionally with the handling of food in another Member State would have difficulty in obtaining the licence required to enable it to open an establishment in Estonia if it were awarded the contract.

86. The procedures for obtaining such a licence must satisfy the general criteria laid down in Directive 2006/123/EC,³⁸ including administrative simplification.³⁹ In fact, the Ministry of Social Affairs argued that a non-Estonian tenderer would be able to obtain a licence or registration in a short period of time,⁴⁰ an assertion which could be applied to the performance stage of the contract.

87. The Estonian Government's argument to the effect that it would be possible for any tenderer established in another Member State to rely on the capacities of a third-party undertaking which already has the relevant licence or registration certificate in Estonia cannot be upheld either.

88. Articles 47(2) and 48(3) of Directive 2004/18 'recognise the right of every economic operator to rely, for a particular contract, upon the capacities of other entities'.⁴¹ Precisely because that is a right and not a duty, it makes no sense to impose on a tenderer the obligation to rely on the capacities of another economic operator where that tenderer is capable of performing the contract by itself.⁴²

89. In summary, the imposition of the requirements at issue in relation to food-handling establishments, as a condition for the performance of the contract, is a less onerous measure which, first, ensures respect for the principle of equality and greater competition between tenderers and, second, enables the consistent application of the general rules and the mandatory specific rules, thereby preventing any friction when it comes to the effective application of EU law.

³⁸ Directive of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ 2006 L 376, p. 36). It must be borne in mind that, for the purposes of that directive, the definition of 'service' is broader than that of 'public service contracts' in Directive 2004/18.

³⁹ Under Article 5(1) of Directive 2006/123, Member States must 'examine the procedures and formalities applicable to access to a service activity and to the exercise thereof. Where procedures and formalities examined ... are not sufficiently simple, Member States shall simplify them.'

⁴⁰ It argued before the Tallinna Halduskohus (Administrative Court, Tallinn) that, in view of the period for the submission of tenders in an international tendering procedure (a minimum of 40 days) and the period required for the licensing procedure set out in the ToiduS (30 days), a tenderer had sufficient time to complete the licensing procedure (point 3, third paragraph, under the heading 'Facts and procedure' in the order for reference).

⁴¹ Judgment of 2 June 2016, *Pizzo*, C-27/15, EU:C:2016:404, paragraph 25.

⁴² That would also create a situation where undertakings established outside Estonia were dependent on those established in that country. Again, the latter would be in a more favourable position than the former.

V. Conclusion

90. In the light of the foregoing considerations, I suggest that the following answers be given to the first two questions referred by the Tallinna Ringkonnakohus (Court of Appeal, Tallinn, Estonia):

‘Articles 2 and 46 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 are to be interpreted as meaning that a contracting authority may not require, as a qualifying condition which must be met, failing which a tenderer will be excluded, that tenderers or candidates whose professional suitability has been recognised in their own Member State must furnish with their tenders an activity licence or evidence of registration issued by the authorities of the Member State of the place of the contract.

However, if the contract notice or tender specifications require with justification that the successful tenderer must have an establishment in the Member State of the contracting authority, Articles 2 and 46 of Directive 2004/18 do not preclude a requirement that tenderers must provide evidence, at the performance stage of the contract and in relation to that establishment, that they have the relevant licence or registration issued by the competent authorities for control of the stages of production, processing and distribution of food in that Member State, in accordance with Article 6 of Regulation (EC) No 852/2004 of the European Parliament and of the Council of 29 April 2004 on the hygiene of foodstuffs.’