



Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

20 December 2017*

(Reference for a preliminary ruling — Public works contracts — Directive 2004/18/EC — Article 45(2) and (3) — Conditions for exclusion from participation in public procurement — Declaration regarding the absence of convictions of former directors of the tendering company — Criminal conduct of a former director — Criminal conviction — Actual and complete dissociation between the tendering company and that director — Evidence — Assessment by the contracting entity of the requirements relating to that obligation)

In Case C-178/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Consiglio di Stato (Council of State, Italy), made by decision of 1 December 2015, received at the Court on 24 March 2016, in the proceedings

Impresa di Costruzioni Ing. E. Mantovani SpA,

Guerrato SpA

v

Provincia autonoma di Bolzano,

Agenzia per i procedimenti e la vigilanza in materia di contratti pubblici di lavori servizi e forniture (ACP),

Autorità nazionale anticorruzione (ANAC),

intervening parties:

Società Italiana per Condotte d'Acqua SpA,

Inso Sistemi per le Infrastrutture Sociali SpA,

THE COURT (Fourth Chamber),

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

Advocate General: M. Campos Sánchez-Bordona,

Registrar: L. Hewlett, Principal Administrator,

* Language of the case: Italian.

having regard to the written procedure and further to the hearing on 5 April 2017,

after considering the observations submitted on behalf of:

- Impresa di Costruzioni Ing. E. Mantovani SpA and Guerrato SpA, by M.A. Sandulli and L. Antonini, avvocati,
- the Provincia autonoma di Bolzano and the Agenzia per i procedimenti e la vigilanza in materia di contratti pubblici di lavori servizi e forniture (ACP), by C. Guccione, avvocato, R. von Guggenberg, Rechtsanwältin, L. Fadanelli, A. Roilo and S. Bikircher, avvocati,
- Società Italiana per Condotte d’acqua SpA, by A. Guarino and C. Martelli, avvocati,
- the Italian Government, by G. Palmieri, acting as Agent, and by C. Pluchino and P. Grasso, avvocati dello Stato,
- the European Commission, by G. Gattinara and A. Tokár, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 21 June 2017,

gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 45(2)(c) and (g) and Article 45(3)(a) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114) and of certain general principles of EU law.
- 2 The request has been made in proceedings between Impresa di Costruzioni Ing. E. Mantovani SpA (‘Mantovani’) and Guerrato SpA, the former acting in its own name and capacity as lead contractor of the temporary association of undertakings to be established with Guerrato, and the Provincia autonoma di Bolzano (Autonomous Province of Bolzano, Italy; ‘the Province of Bolzano’), the Agenzia per i procedimenti e la vigilanza in materia di contratti pubblici di lavori servizi e forniture (ACP) (Agency in charge of the procedures governing and monitoring of public works contracts, public service contracts and public supply contracts (ACP)) and the Autorità nazionale anticorruzione (ANAC) (National Anti-Corruption Authority (ANAC)) concerning the exclusion of Mantovani from the tender procedure relating to the award of a works contract for the financing, design of the final executive project, construction and management of the new Bolzano correctional facility.

Legal context

European Union law

- 3 Recital 2 of Directive 2004/18 states:

‘The award of contracts concluded in the Member States on behalf of the State, regional or local authorities and other bodies governed by public law entities, is subject to the respect of the principles of the Treaty and in particular to the principle of freedom of movement of goods, the principle of

freedom of establishment and the principle of freedom to provide services and to the principles deriving therefrom, such as the principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality and the principle of transparency. ...'

- 4 Article 45 of Directive 2004/18, headed 'Personal situation of the candidate or tenderer', provides as follows:

'1. Any candidate or tenderer who has been the subject of a conviction by final judgment of which the contracting authority is aware for one or more of the reasons listed below shall be excluded from participation in a public contract:

...

For the purposes of this paragraph, the contracting authorities shall, where appropriate, ask candidates or tenderers to supply the documents referred to in paragraph 3 and may, where they have doubts concerning the personal situation of such candidates or tenderers, also apply to the competent authorities to obtain any information they consider necessary on the personal situation of the candidates or tenderers concerned. Where the information concerns a candidate or tenderer established in a State other than that of the contracting authority, the contracting authority may seek the cooperation of the competent authorities. Having regard for the national laws of the Member State where the candidates or tenderers are established, such requests shall relate to legal and/or natural persons, including, if appropriate, company directors and any person having powers of representation, decision or control in respect of the candidate or tenderer.

2. Any economic operator may be excluded from participation in a contract where that economic operator:

...

(c) has been convicted by a judgment which has the force of *res judicata* in accordance with the legal provisions of the country of any offence concerning his professional conduct;

(d) has been guilty of grave professional misconduct proved by any means which the contracting authorities can demonstrate;

...

(g) is guilty of serious misrepresentation in supplying the information required under this Section, or has not supplied such information.

Member States shall specify, in accordance with their national law and having regard for Community law, the implementing conditions for this paragraph.

3. Contracting authorities shall accept the following as sufficient evidence that none of the cases specified in paragraphs 1 or 2(a), (b), (c), (e) or (f) applies to the economic operator:

(a) as regards paragraphs 1 and 2(a), (b) and (c), the production of an extract from the "judicial record" or, failing that, of an equivalent document issued by a competent judicial or administrative authority in the country of origin or the country whence that person comes showing that these requirements have been met;

...'

Italian law

- 5 Decreto legislativo No 163 — Codice dei contratti pubblici relativi a lavori, servizi e forniture in attuazione delle direttive 2004/17/CE e 2004/18/CE (Legislative Decree No 163/2006 establishing the Code on public works contracts, public service contracts and public supply contracts pursuant to Directives 2004/17/EC and 2004/18/EC) of 12 April 2006 (Ordinary Supplement to GURI No 100 of 2 May 2006), as amended by Decree-Law No 70 of 13 May 2011 (GURI No 110 of 13 May 2011, p. 1), converted into law by Law No 106 of 12 July 2011 (GURI No 160 of 12 July 2011, p. 1) ('Legislative Decree No 163/2006'), governs, in their entirety, the procedures in Italy for the award of public works contracts, public service contracts and public supply contracts.
- 6 Legislative Decree No 163/2006 contains, in Part II thereof, Article 38, which lays down the general requirements for taking part in procedures for the award of concessions and public works contracts, public service contracts and public supply contracts. Article 38(1)(c) of the decree provides:

'The following persons shall be excluded from any participation in procedures for the award of concessions and public works contracts, public service contracts and public supply contracts, and are prohibited from taking part as subcontractors or from concluding any related contract:

...

- (c) any person who has been the subject of a conviction that has the force of *res judicata* or a criminal order against which no appeal lies, or who has been the subject of a judgment implementing a sentence resulting from a negotiated plea, as provided for in Article 444 of the Code of Criminal Procedure, in respect of the commission of grave professional conduct offences to the detriment of the State or the Community; the following constitute, in any event, grounds for exclusion: a conviction set out in a judgment which has the force of *res judicata* for one or more offences relating to participation in a criminal organisation, corruption, fraud or money laundering, as defined by the Community measures cited in Article 45(1) of Directive 2004/18; the exclusion and prohibition shall apply if the judgment or order was made against: the owner or the technical director, if the case involves a sole trader; partners or the technical director, if the case involves a general partnership; the general partners or the technical director, if the case involves a semi-limited partnership; directors with powers of representation, the technical director or the natural person sole shareholder, or the majority shareholder in the case of a company with less than four shareholders, if the case involves another type of company or consortium. In any event, the exclusion and prohibition shall also apply to persons dismissed from their posts in the year preceding the date of publication of the contract notice, where the undertaking does not show that it has fully and effectively dissociated itself from the criminal conduct sanctioned; the exclusion and prohibition in any event shall not be effective where the offence was decriminalised or if rehabilitation has been deemed to have occurred, namely where the conviction was declared spent or where the conviction has been overturned; ...'

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

- 7 By a notice published in the *Official Journal of the European Union* on 27 July 2013 (S 145-251280), the Province of Bolzano launched an open tendering procedure for the award of a public works contract concerning the financing, design of the final executive project, construction and management of the new Bolzano correctional facility. The estimated amount of the works was EUR 165 400 000.
- 8 Mantovani submitted a request for participation on 16 December 2013 in its own name and as lead contractor of a temporary association of undertakings which was to be established. That undertaking produced two declarations concerning compliance with the general requirements laid down in Article 38 of Legislative Decree No 163/2006. On 4 December 2013, it stated that Mr B., in his

capacity as Chairman of the Board, Managing Director and legal representative who had ceased to perform his duties on 6 March 2013, had not been the subject of a conviction having the force of *res judicata*. On 16 December 2013, Mantovani reiterated that declaration.

- 9 At its meeting on 9 January 2014, the contracting authority conditionally authorised Mantovani's application, while awaiting it to provide further information with respect to Mr B. An article in the local press, published on 6 December 2013, revealed that Mr B. had been the subject of a criminal prosecution, for having instigated a system of false invoices, and had negotiated a plea entailing a conviction and sentence of 1 year and 10 months' imprisonment.
- 10 Subsequently, the contracting authority obtained Mr B.'s criminal record, which showed that that conviction was handed down on 5 December 2013, and became final on 29 March 2014. At its meeting on 29 May 2014, the contracting authority requested Mantovani to provide it with details of that conviction.
- 11 Mantovani replied by claiming, *inter alia*, that Mr B.'s conviction had become final following its own declarations of 4 and 16 December 2013, the judgment of 6 December 2013 having been given in camera without any public hearing, and its publication having occurred only on 3 February 2014. Mantovani further stated that, in order to fully and effectively dissociate the company from Mr B.'s actions, the latter was immediately removed from his management role in the Mantovani group, the management bodies of the company had been reorganised, Mr B.'s shares had been bought back and an action for damages had been brought against him.
- 12 After having established a classification in which Mantovani was conditionally positioned in fifth place, the contracting authority requested an opinion from the ANAC concerning the lawfulness of a possible exclusion of Mantovani. The ANAC replied, in essence, that although, in the absence of a final judgment, Mantovani's statement could not be classified as a 'misrepresentation', the lack of timely notification of criminal proceedings concerning one of the persons mentioned in Article 38(1)(c) of Legislative Decree No 163/2006 may constitute an infringement of the obligation of sincere cooperation with the contracting authority, and accordingly impede the full and effective dissociation from the person concerned.
- 13 In those circumstances, the contracting authority decided, at its meeting of 27 February 2015, to exclude Mantovani from the tender procedure. According to the minutes of that meeting, it was found that the general requirements laid down in Article 38 of Legislative Decree No 163/2006 were not met 'because of the late and inadequate information provided by the company in order to prove that it had dissociated itself from the criminal conduct of the person having ceased to perform management functions' and that the conviction 'was handed down prior to the statement submitted in the tender procedure and could, as such, have been notified by Mantovani at the stage when its participation was being assessed'.
- 14 Mantovani brought an action before the Tribunale regionale di giustizia amministrativa, Sezione Autonoma di Bolzano (Regional Administrative Court, Autonomous Division of Bolzano, Italy) against that exclusion decision. By judgment of 27 August 2015, that court confirmed the lawfulness of the exclusion, on the basis that Mr B.'s conviction could have been the subject of a declaration during the tendering procedure and that only a tenderer who submitted factually accurate statements without misleading the contracting authority was entitled to claim the benefit of the dissociation referred to in Article 38(1)(c) of Legislative Decree No 163/2006.
- 15 Mantovani appealed against that judgment before the Consiglio di Stato (Council of State, Italy) on the ground, *inter alia*, that Article 38 of Legislative Decree No 163/2006 is contrary to EU law, and applied for a request for a preliminary ruling to be referred to the Court.

- 16 In those circumstances, the Consiglio di Stato (Council of State) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Is it contrary to the correct application of Article 45(2)(c) and (g) and Article 45(3)(a) of Directive 2004/18, and of the EU law principles of protection of legitimate expectations and legal certainty, equal treatment, proportionality and transparency, of the prohibition of making the procedure more cumbersome, and of the greatest possible openness to competition of public tender procedures, as well as of the principle of completeness and accuracy of the requirements governing the implementation of penalties, for national legislation such as Article 38(1)(c) of Legislative Decree [No 163/2006] to extend the legal obligation to make a declaration regarding the absence of convictions by way of final judgment (including judgments implementing a sentence resulting from a negotiated plea), for the offences referred to in that provision, to office holders in the companies intending to submit a tender who ceased to hold office in the year preceding the publication of the tender notice, which amounts to a corresponding ground for exclusion of that company from the call for tenders if the undertaking fails to show that there has been complete and genuine dissociation from the conduct which carries criminal sanctions, where assessment of compliance with the dissociation requirement is a matter for the contracting authority, which contracting authority can effectively introduce certain obligations entailing the exclusion of the tenderer in the event that they are not fulfilled, namely:

- (i) an obligation to provide information and make declarations relating to criminal activities not yet settled by a final judgment (and the outcome of which is therefore uncertain), not laid down in the Legislative Decree, even in respect of office holders;
- (ii) an obligation of voluntary dissociation, without describing the kind of conduct which would be exculpatory, the period to be taken into account (including whether it must occur before the criminal conviction becomes final) and the stage of the proceedings at which those obligations must be implemented;
- (iii) an obligation of sincere cooperation, not clearly defined, except with reference to the general principle of good faith?’

Consideration of the question referred

Admissibility

- 17 The Province of Bolzano takes the view that the reference for a preliminary ruling is inadmissible. In its view, the Court of Justice has already ruled, in the judgment of 10 July 2014, *Consorzio Stabile Libor Lavori Pubblici* (C-358/12, EU:C:2014:2063), on an issue relating to the interpretation of Article 45(2) of Directive 2004/18 which is similar to that raised in the present case.
- 18 In that regard, it is sufficient to note that a request for a preliminary ruling on interpretation is not inadmissible simply because it is similar to a request for a preliminary ruling on which the Court has already ruled. In any event, the case which gave rise to the judgment referred to in the previous paragraph concerned a different legal situation, characterised by the exclusion of a tenderer for non-payment of social security contributions in the context of a tendering procedure to which only the fundamental rules and general principles of the FEU Treaty were applicable, since the threshold laid down in Article 7(c) of Directive 2004/18 had not been reached.
- 19 The Province of Bolzano is of the opinion, moreover, that the question referred for a preliminary ruling has no connection with the main proceedings, since the exclusion was not a penalty for breach of the requirement governing notification or reporting, but for the lack of full and effective dissociation

between Mantovani and the conduct of Mr B., its former director. Moreover, the reference to the ground for exclusion relating to misrepresentation referred to in Article 45(2)(g) and (3) of Directive 2004/18 is neither relevant nor decisive.

- 20 In that regard, it should be recalled that questions concerning EU law enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court for a preliminary ruling only where it is obvious that the interpretation of EU law that is sought is unrelated to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgment of 8 September 2015, *Taricco and Others*, C-105/14, EU:C:2015:555, paragraph 30 and the case-law cited).
- 21 In the present case, the referring court stated that, admittedly, the statements made by Mantovani on 4 and 16 December 2013 concerning the lack of a judgment having the force of *res judicata* cannot be described as a ‘misrepresentation’ within the meaning of Article 45(2)(g) of Directive 2004/18. Nonetheless, that court stated that it was faced with the question of whether EU law permits the taking into consideration of the absence of a declaration concerning criminal proceedings against former directors of the tendering company, who have not yet been the subject of a final judgment.
- 22 In those circumstances, it is not clear that the question referred has no bearing on the actual situation or on the subject matter of the main proceedings.
- 23 The request for a preliminary ruling is therefore admissible.

Substance

- 24 By its question, the referring court asks, in essence, whether Directive 2004/18, in particular Article 45(2)(c) and (g) and Article 45(3)(a) thereof, and the principles of protection of legitimate expectations, legal certainty, equal treatment, proportionality and transparency are to be interpreted as meaning that they preclude national legislation allowing the contracting authority to take into consideration, under the conditions established by that authority, the criminal conviction of the director of a company for an offence relating to the professional conduct of that undertaking, where that director ceased to perform his duties in the year preceding the publication of the tender notice and to exclude that undertaking from participating in the public tender procedure at issue, on the ground that, by failing to declare the conviction which was not yet final, it had not fully and effectively dissociated itself from the activities of that director.
- 25 As a preliminary point, it should be noted that the referring court refers, in the wording of the question referred, to the grounds for exclusion laid down in Article 45(2)(c) and (g) of Directive 2004/18, relating to the exclusion of a tenderer who has been the subject of a judgment which has the force of *res judicata* in accordance with the legislation of the country concerned in respect of an offence concerning his professional conduct, and of a tenderer who is guilty of misrepresentation in supplying the information required under Section 2 of Chapter VII of that directive or has not supplied that information.
- 26 As is apparent from the information contained in the order for reference, Mantovani was excluded from the tendering procedure on the ground that it had submitted, late and incomplete, the evidence which proved that it had dissociated itself from the conduct of its director. It was in particular criticised for not having indicated, in its statements of 4 and 16 December 2013, that its former director was the subject of criminal proceedings which resulted in a conviction negotiated *in camera* on 6 December 2013.

- 27 Therefore, as submitted by the European Commission, it could be held that the facts in the main proceedings may fall within the ground for exclusion laid down in Article 45(2)(d) of Directive 2004/18, which allows the exclusion of a tenderer who is guilty of grave professional misconduct, of which the contracting authorities may provide evidence by any means.
- 28 According to settled case-law, the fact that the referring court's question refers to certain provisions of EU law does not mean that the Court may not provide the national court with all the guidance on points of interpretation which may be of assistance in adjudicating on the case pending before it, whether or not that court has referred to those points in its question. It is, in that regard, for the Court to extract from all the information provided by the referring court, in particular from the grounds of the order for reference, the points of EU law which require interpretation in view of the subject matter of the dispute (see, *inter alia*, judgment of 22 October 2015, *Impresa Edilux and SICEF*, C-425/14, EU:C:2015:721, paragraph 20 and the case-law cited).
- 29 In those circumstances, it must be held that the request for a preliminary ruling also seeks the interpretation of the optional grounds for exclusion contained in Article 45(2)(d) of Directive 2004/18.
- 30 As regards the optional grounds of exclusion, it should be noted at the outset that, in accordance with the last subparagraph of Article 45(2) of Directive 2004/18, it is for the Member States, in compliance with EU law, to lay down 'the implementing conditions'.
- 31 In accordance with settled case-law, Article 45(2) of Directive 2004/18 does not provide for uniform application at EU level of the grounds of exclusion it mentions, since the Member States may choose not to apply those grounds of exclusion, or to incorporate them into national law with varying degrees of rigour according to legal, economic or social considerations prevailing at national level. In that context, Member States have the power to make the criteria laid down in Article 45(2) less onerous or more flexible (judgment of 14 December 2016, *Connexxion Taxi Services*, C-171/15, EU:C:2016:948, paragraph 29 and the case-law cited).
- 32 Member States therefore enjoy some discretion in determining the requirements governing the application of the optional grounds for exclusion laid down in Article 45(2) of Directive 2004/18.
- 33 As regards the optional ground for exclusion provided for in Article 45(2)(c) of the directive, which authorises contracting authorities to exclude from participation in a tendering procedure a tenderer who has been the subject of a judgment which has the force of *res judicata*, in accordance with the legislation of the country at issue, relating to an offence concerning the professional conduct of the tenderer, it should be noted, first, that it does not specify to what extent the offences committed by managers or directors of a legal person may result in the exclusion of that legal person under that provision.
- 34 However, as noted by the Advocate General in points 54 and 58 of his Opinion, EU law is based on the premiss that legal persons act through their representatives. Conduct contrary to the professional ethics of those representatives may thus constitute a relevant factor in assessing the professional conduct of an undertaking. It is thus perfectly permissible for Member States to retain, as part of the exercise of their powers to determine the requirements governing the application of the optional grounds for exclusion, among the relevant factors in assessing the integrity of the tendering company, the possibility that certain actions of directors of that company are contrary to professional ethics.
- 35 In that regard, Article 45(1), in fine, of Directive 2004/18 acknowledges, in the context of the mandatory grounds for exclusion, that national law may take into account the existence of wrongdoing on the part of the directors of the legal person. There is therefore nothing to preclude Member States, when implementing the ground for exclusion laid down in Article 45(2)(c) of Directive 2004/18, from considering that acts of a director representing the tendering company are imputable to that company.

- 36 The taking into account, in the context of the ground for exclusion laid down in Article 45(2)(c) of Directive 2004/18, of the conduct of the directors of a tenderer constituted as a legal person cannot therefore be regarded as an ‘extension’ of the scope of that ground for exclusion; it constitutes an implementation of that scope which maintains the effectiveness of that ground for exclusion.
- 37 Next, the fact that the factual elements which may lead to the exclusion of the tenderer, as a result of the conduct of a director who had ceased to hold office on the date of the submission of the application to take part in the tender procedure, does not preclude the application of that ground for exclusion.
- 38 That ground for exclusion relates, self-evidently, to the wrongful conduct of an economic operator before the procedure for the award of a public contract. It is up to the Member States to determine, taking into account the principle of proportionality, the date from which such conduct may justify the exclusion of the tenderer.
- 39 As regards, moreover, the question whether or not an offence affected the professional conduct of the tendering company, it should be noted that participation in the issuing of false invoices by the director of a company may be regarded as an offence involving professional misconduct.
- 40 Finally, as regards the requirement that the judgment must have the force of *res judicata*, it should be noted that that condition was fulfilled in the case in the main proceedings, given that the decision to exclude was taken after the judgment relating to Mr B. had acquired the force of *res judicata*.
- 41 In accordance with the case-law cited in paragraph 31 of the present judgment, the Member State is entitled to ease the requirements governing the application of the optional grounds for exclusion and, thus, to waive the application of a ground for exclusion in the event of a dissociation between the tenderer and the conduct constituting an offence. In the present case, it is also entitled to determine the requirements governing that dissociation and to require, as Italian law does, that the tenderer inform the contracting authority of a conviction of its director, even if the conviction is not yet final.
- 42 The tendering company, which must meet those requirements, may submit all the evidence which, in its view, is evidence of such a dissociation.
- 43 If that dissociation cannot be proved to the satisfaction of the contracting authority, the necessary consequence is the application of the ground for exclusion.
- 44 Having regard to what was established in paragraph 27 of the present judgment, in a situation where the judgment relating to an offence concerning the professional conduct of the director of a tendering company is not yet final, Article 45(2)(d) of Directive 2004/18 may apply. That provision makes it possible to exclude a tendering company which has been found guilty of grave professional misconduct, established by any means which the contracting authorities can provide proof of.
- 45 In that respect, it should be noted that the considerations set out in paragraphs 34 to 43 of the present judgment are valid and applicable *mutatis mutandis* in respect of grave professional misconduct.
- 46 In relation to the application of Article 45(2)(c) of Directive 2004/18, one of the differences lies in the fact that the contracting authority may provide proof ‘by any means’ of the existence of such grave professional misconduct.
- 47 To that effect, a judicial decision, even though it is not yet final may, depending on the subject of the decision, provide the contracting authority with the appropriate means by which to substantiate the existence of grave professional misconduct, its decision being, in any event, open to judicial review.

- 48 It should be added that, under Article 45(2)(g) of Directive 2004/18, a tenderer may be excluded if it is guilty of misrepresentation, but also where it does not provide the information required pursuant to Section 2 of Chapter VII of Title II of that directive, namely the ‘criteria for qualitative selection’. Thus, failure to inform the contracting authority of the criminal conduct of the former director may also make it possible to exclude, under that provision, a tenderer from participating in a procedure for the award of a public works contract.
- 49 As regards Article 45(3)(a) of the directive, it is sufficient to note that the referring court does not explain how the interpretation of that provision is necessary in the light of the facts in the main proceedings.
- 50 The national court, in its reference for a preliminary ruling, further refers to several principles, of which only some have been elevated to principles of EU law, without explaining precisely how, having regard to the facts of the case, they may be relevant and preclude the national legislation at issue in the main proceedings.
- 51 As regards the principle of equal treatment, it is sufficient, in those circumstances, to point out that, in view of the objective of that legislation, which is to protect the integrity of the public procurement procedure, the situation of a tendering company whose director has committed an offence relating to the professional conduct of that undertaking or grave professional misconduct cannot be regarded as comparable to that of a tenderer whose director is not guilty of such conduct.
- 52 As regards the principle of legal certainty, of the protection of legitimate expectations and of the principle of transparency, the request for a preliminary ruling gives no indication of how those principles may need to be interpreted in the light of the case in the main proceedings.
- 53 As regards the principle of proportionality, it is necessary to examine its application in the light of the impact of the date from which the wrongful conduct of the administrator may be regarded as leading to the exclusion of the tendering company. If the intervening period is too significant, the national legislation is likely to reduce the scope of the EU directives on public procurement.
- 54 In that context, the taking into account of wrongful conduct during the year preceding the date of publication of the tender notice does not appear to be disproportionate, especially since the legislation at issue in the main proceedings provides that an undertaking may prove that it effectively and completely dissociated itself from the conduct of its director.
- 55 In the light of all of the foregoing considerations, the answer to the question referred is that Directive 2004/18, in particular Article 45(2)(c), (d) and (g) of that directive, and the principles of equal treatment and proportionality, must be interpreted as not precluding national legislation which allows the contracting authority:
- to take into consideration, in accordance with the conditions it has laid down, a criminal conviction of the director of a tendering company, even if the conviction is not yet final, in respect of an offence concerning the professional conduct of that company where the director ceased to perform his duties in the year preceding the publication of the tender notice, and
 - to exclude that company from taking part in the tendering procedure at issue, on the ground that, by failing to declare the conviction which was not yet final, it had not fully and effectively dissociated itself from that director’s activities.

Costs

- 56 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:

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, in particular Article 45(2)(c), (d) and (g) of that directive, and the principles of equal treatment and proportionality, must be interpreted as not precluding national legislation which allows the contracting authority:

- **to take into consideration, in accordance with the conditions it has laid down, a criminal conviction of the director of a tendering company, even if the conviction is not yet final, for an offence concerning the professional conduct of that company where the director ceased to perform his duties in the year preceding the publication of the tender notice, and**
- **to exclude that company from taking part in the tendering procedure at issue, on the ground that, by failing to declare the conviction which was not yet final, it had not fully and effectively dissociated itself from that director's activities.**

[Signatures]