

JUDGMENT OF THE COURT (Fourth Chamber)

19 May 2009*

In Case C-538/07,

REFERENCE for a preliminary ruling under Article 234 EC, by the Tribunale Amministrativo Regionale per la Lombardia (Italy), made by decision of 14 November 2007, received at the Court on 3 December 2007, in the proceedings

Assitur Srl

v

Camera di Commercio, Industria, Artigianato e Agricoltura di Milano,

third party:

SDA Express Courier SpA,

* Language of the case: Italian.

Poste Italiane SpA,

THE COURT (Fourth Chamber),

composed of K. Lenaerts, President of the Chamber, R. Silva de Lapuerta, E. Juhász (Rapporteur), G. Arestis and J. Malenovský, Judges,

Advocate General: J. Mazák,
Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 4 December 2008,

after considering the observations submitted on behalf of:

- Assitur Srl, by S. Quadrio, avvocato,

- Camera di Commercio, Industria, Artigianato e Agricoltura di Milano, by M. Bassani, avvocato,

- SDA Express Courier SpA, by A. Vallefucoco and V. Vallefucoco, avvocati,

- Poste Italiane SpA, by A. Fratini, avvocatessa,

- the Italian Government, by I.M. Braguglia, acting as Agent, and G. Fiengo, avvocato dello Stato,

- the Commission of the European Communities, by D. Kukovec and D. Recchia, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 10 February 2009,

gives the following

Judgment

- ¹ This reference for a preliminary ruling concerns the interpretation of the first subparagraph of Article 29 of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), as well as the general principles of Community law governing public contracts.

- ² This reference for a preliminary ruling was made in the course of proceedings between Assitur Srl ('Assitur') and the Camera di Commercio, Industria, Artigianato e Agricoltura di Milano (Milan Chamber of Commerce, Industry, Crafts and Agriculture) concerning the compatibility with the abovementioned provisions and principles of national legislation precluding undertakings linked by a relationship of control or a

relationship in which one undertaking exercises decisive influence over the other from participating — separately and as competing tenderers — in the same procedure for the award of a public contract.

Legal context

Community legislation

- 3 As part of Chapter 2 of Directive 92/50, entitled ‘Criteria for qualitative selection’, the first paragraph of Article 29 provides:

‘Any service provider may be excluded from participation in a contract who:

- (a) is bankrupt or is being wound up, whose affairs are being administered by the court, who has entered into an arrangement with creditors, who has suspended business activities or who is in any analogous situation arising from a similar procedure under national laws and regulations;

- (b) is the subject of proceedings for a declaration of bankruptcy, for an order for compulsory winding-up or administration by the court or for an arrangement with creditors or of any other similar proceedings under national laws or regulations;

- (c) has been convicted of an offence concerning his professional conduct by a judgement which has the force of *res judicata*;

- (d) has been guilty of grave professional misconduct proven by any means which the contracting authorities can justify;

- (e) has not fulfilled obligations relating to the payment of social security contributions in accordance with the legal provisions of the country in which he is established or with those of the country of the contracting authority;

- (f) has not fulfilled obligations relating to the payment of taxes in accordance with the legal provisions of the country of the contracting authority;

- (g) is guilty of serious misrepresentation in supplying or failing to supply the information that may be required under this Chapter.⁴

⁴ The second and third subparagraph of Article 3(4) of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works

contracts (OJ 1993 L 199, p. 54), defines the concepts of ‘affiliated undertakings’ and ‘dominant influence’ of one undertaking over another. As regards public works concession contracts, it states:

‘Undertakings which have formed a group in order to obtain the concession contract, or undertakings affiliated to them, shall not be regarded as third parties.

An “affiliated undertaking” means any undertaking over which the concessionaire may exercise, directly or indirectly, a dominant influence or which may exercise a dominant influence over the concessionaire or which, in common with the concessionaire, is subject to the dominant influence of another undertaking by virtue of ownership, financial participation or the rules which govern it. A dominant influence on the part of an undertaking shall be presumed when, directly or indirectly in relation to another undertaking, it:

— holds the major part of the undertaking’s subscribed capital, or

— controls the majority of the votes attaching to shares issued by the undertakings, or

- can appoint more than half of the members of the undertaking's administrative, managerial or supervisory body.'

National legislation

5 Directive 92/50 was transposed into Italian law by Legislative Decree No 157 of 17 March 1995 (GURI No 104 of 6 May 1995, ordinary supplement). That legislative decree does not prohibit undertakings between which there exists a relationship of control or which are affiliated to one another from participating in the same procedure for the award of public service contracts.

6 Article 10(1bis) of Law No 109 of 11 February 1994, the Framework Law on public works (GURI No 41 of 19 February 1994, 'Law No 109/1994') provides:

'Undertakings between which there exists one of the control relationships specified in Article 2359 of the Civil Code may not participate in the same tendering procedure.'

7 Article 2359 of the Civil Code, entitled 'Controlled companies and affiliated companies', provides:

‘The following shall be regarded as controlled companies:

- (1) companies in which another company holds the majority of the voting rights that may be exercised in ordinary shareholders’ meetings;
- (2) companies in which another company holds sufficient voting rights to exercise a dominant influence in ordinary shareholders’ meetings;
- (3) companies which are under the dominant influence of another company by virtue of particular contractual provisions entered into with the latter.

For the purposes of applying points (1) and (2) of the first paragraph, account shall also be taken of votes available to controlled companies, trust companies and intermediaries; no account shall be taken of votes available on behalf of third parties.

Companies over which another company exercises significant influence shall be regarded as affiliated. Such influence shall be presumed on the part of another company where, in ordinary general meetings, it can exercise at least one fifth of the votes, or one tenth if the company shares are quoted on regulated markets.’

8 Procedures for the award of public works contracts, public supply contracts and public service contracts are currently governed, in their entirety, by Legislative Decree No 163

of 12 April 2006 (GURI No 100 of 2 May 2006, ordinary supplement, 'Legislative Decree No 163/2006'). The last paragraph of Article 34 of that legislative decree provides:

'Tenderers between which there exists a relationship of control, of the kind envisaged in Article 2359 of the Civil Code, may not take part in the same tendering procedure. Contracting authorities shall also exclude from such procedures tenderers whose respective tenders are found, on the basis of unambiguous evidence, to be attributable to one and the same decision-making centre.'

The main proceedings and the question referred for a preliminary ruling

- 9 By notice of 30 September 2003, the Camera di Commercio, Industria, Artigianato e Agricoltura di Milano announced a public invitation to tender for the award, on a lowest-price basis, of a courier-service contract (for collection and delivery of correspondence and miscellaneous documentation) for the Camera di Commercio, Industria, Artigianato e Agricoltura di Milano and its company CedCamera, for the three-year period 2004 to 2006. The basic bid price was EUR 530 000, excluding VAT.
- 10 Following examination of the documentation submitted by the tenderers, SDA Express Courier SpA ('SDA'), Poste Italiane SpA ('Poste Italiane') and Assitur were admitted to the tendering procedure.
- 11 On 12 November 2003, Assitur requested that SDA and Poste Italiane be excluded from the tendering procedure, because of links between those two companies.

- 12 An inquiry carried out in this connection at the request of the contracts commission showed that the entire share capital of SDA was held by Attività Mobiliari SpA, which in turn was wholly-owned by Poste Italiane. However, given that Legislative Decree No 157 of 17 March 1995, which governs public service contracts, does not prohibit undertakings of which one controls the other from participating in the same procedure for the award of a public contract, and that the inquiry carried out did not bring up any solid and consistent evidence such as to raise any suspicion that the principles of competition and secrecy of tender had, in this instance, been breached the contracting authority decided, by Decision No 712 of 2 December 2003, to award the contract to SDA, which had presented the lowest bid.
- 13 Assitur brought an action for annulment of that decision before the Tribunale Amministrativo Regionale per la Lombardia. Assitur submitted that, by virtue of Article 10(1bis) of Law No 109/1994 — which, according to Assitur, in the absence of other specific legislation, applies also to service contracts — the contracting authority should have excluded from the procedure to award the contract undertakings linked by a relationship of control, as envisaged by Article 2359 of the Italian Civil Code.
- 14 The referring court states that Article 10(1bis) of Law No 109/1994, which specifically governs works contracts, establishes a presumption, not open to rebuttal, that the tender of the controlled undertaking was known to the undertaking controlling it. Therefore, the legislature does not regard the relevant economic operators — given that they are closely linked by common interests — as capable of drawing up tenders of the requisite independence, soundness and reliability because they were closely linked to one another by their common interests. Consequently, Article 10(1bis) of Law No 109/1994 precludes undertakings linked in that way from participating in the same tendering procedure and, where they are found to be participating, those undertakings must be excluded from the selection procedure. The referring court also notes that the concept of ‘controlled undertaking’ in Italian law is analogous to the concept of ‘affiliated undertaking’, the definition of which is laid down in Article 3(4) of Directive 93/37.
- 15 The referring court also states that, according to Italian case-law, a rule such as the one laid down in Article 10(1bis) of Law No 109/1994 has the authority of a rule of public policy which is of general application. In actual fact, that rule reflects a general principle

which goes beyond the field of public works and applies also to procedures for the award of service and supply contracts, notwithstanding the fact that, in relation to the two latter, no such specific provision exists. The legislature confirmed the approach taken by the case-law when it adopted the last paragraph of Article 34 of Legislative Decree No 163/2006, which currently governs all public contracts; however, that provision does not apply to the present case *ratione temporis*.

16 None the less, the referring court asks whether such an approach is compatible with the Community legal order and, in particular, with Article 29 of Directive 92/50, as interpreted by the Court of Justice in Joined Cases C-226/04 and C-228/04 *La Cascina and Others* [2006] ECR I-1347, paragraphs 21 to 23. That provision, which constitutes an expression of the principle of ‘favor participationis’ — whereby as many undertakings as possible should take part in the tendering procedure — comprises, according to that judgment, an exhaustive list of the grounds for exclusion from participation in a tendering procedure for the award of a service contract. Those grounds do not include the situation of undertakings linked by a relationship of control or decisive influence.

17 However, the referring court considers that Article 10(1bis) of Law No 109/1994, as a provision intended to penalise any collusion between undertakings in a tendering procedure, is an expression of the principle of free competition. Consequently, it was adopted in strict compliance with the EC Treaty, in particular with Article 81 EC et seq., and is not really inconsistent with Article 29 of Directive 92/50.

18 In those circumstances, the Tribunale Amministrativo Regionale per la Lombardia decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

‘Does Article 29 of Directive 92/50 ..., in laying down seven grounds for exclusion from participation in procedures for the award of public service contracts, give an exhaustive list of grounds for exclusion and therefore preclude Article 10(1bis) of Law [No 109/1994] (now replaced by Article 34, last paragraph, of Legislative Decree

[No 163/2006]) from imposing a prohibition to the effect that undertakings linked by a relationship of control may not participate in the same tendering procedure?’

The question referred for a preliminary ruling

- 19 For the purpose of answering that question, it must be noted that, according to the case-law of the Court of Justice, the seven grounds for excluding a contractor from participating in a public contract laid down in the first paragraph of Article 29 of Directive 92/50 relate to the professional honesty, solvency and reliability of the tenderer, in other words, his professional qualities (see, to that effect, *La Cascina and Others*, paragraph 21).
- 20 The Court of Justice emphasised in connection with the first paragraph of Article 24 of Directive 93/37, which reproduces the same grounds for exclusion as those mentioned in the first paragraph of Article 29 of Directive 92/50, that the intention of the Community legislature was to adopt in that provision only grounds for exclusion related to the professional qualities of the tenderer. In so far as it reproduces those grounds for exclusion, the Court considered that list to be exhaustive (see, to that effect, Case C-213/07 *Michaniki* [2008] ECR I-9999, paragraphs 42 and 43, as well as the case-law cited).
- 21 The Court added that that this exhaustive list does not, however, preclude the option for Member States to maintain or adopt, in addition to the grounds for exclusion, substantive rules designed, in particular, to ensure, as regards public contracts, observance of the principle of equal treatment of all tenderers and of the principle of transparency which constitute the basis of the directives on procedures for the award of public contracts, provided always that the principle of proportionality is observed (see, to that effect, *Michaniki*, paragraphs 44 to 48 and the case-law cited).

- 22 It is clear that a national legislative measure such as that at issue in the main proceedings is intended to prevent any potential collusion between participants in the same procedure for the award of a public contract and to safeguard the equal treatment of candidates and the transparency of the procedure.
- 23 It must therefore be considered that the first paragraph of Article 29 of Directive 92/50 does not preclude a Member State from laying down, in addition to the grounds for exclusion contained in that provision, other grounds for exclusion intended to guarantee respect for the principles of equality of treatment and transparency, provided that such measures do not go beyond what is necessary to achieve that objective.
- 24 It follows that the compliance with Community law of the national legislation at issue in the main proceedings must be examined again in the light of the principle of proportionality.
- 25 It should be recalled, in this connection, that the Community rules on public procurement were adopted in pursuance of the establishment of the internal market, in which freedom of movement is ensured and restrictions on competition are eliminated (see, to that effect, Case C-412/04 *Commission v Italy* [2008] ECR I-619, paragraph 2).
- 26 In this context of a single internal market and effective competition it is the concern of Community law to ensure the widest possible participation by tenderers in a call for tenders.
- 27 According to the order for reference, the provision at issue in the main proceedings, which is drafted in clear and binding terms, entails for the contracting authorities an absolute obligation to exclude from the procedure for awarding the contract those

undertakings which submit separate and competing tenders, if those undertakings are linked by a relationship of control such as that contemplated by the national legislation at issue in the main proceedings.

- 28 However, it would run counter to the effective application of Community law to exclude systematically undertakings affiliated to one another from participating in the same procedure for the award of a public contract. Such a solution would considerably reduce competition at Community level.
- 29 Thus, clearly, in so far as it extends the prohibition on participation in the same procedure for the award of a contract to situations in which the relationship of control between the undertakings concerned has no effect on their conduct in the course of such procedures, the national legislation at issue in the main proceedings goes beyond what is necessary to achieve the objective of ensuring the application of the principles of equal treatment and transparency.
- 30 Such legislation, which is based on an irrebuttable presumption that tenders submitted for the same contract by affiliated undertakings will necessarily have been influenced by one another, breaches the principle of proportionality in that it does not allow those undertakings an opportunity to demonstrate that, in their case, there is no real risk of occurrence of practices capable of jeopardising transparency and distorting competition between tenderers (see, to that effect, Joined Cases C-21/03 and C-34/03 *Fabricom* [2005] ECR I-1559, paragraphs 33 and 35, and *Michaniki*, paragraph 62).
- 31 It should be pointed out in this connection that groups of undertakings can have different forms and objectives, which do not necessarily preclude controlled undertakings from enjoying a certain autonomy in the conduct of their commercial

policy and their economic activities, inter alia, in the area of their participation in the award of public contracts. Moreover, as the Commission pointed out in its written observations, relationships between undertakings in the same group may be governed by specific provisions, for example, of a contractual nature, such as to guarantee both independence and confidentiality in the drawing-up of tenders to be submitted simultaneously by the undertakings in question in the same tendering procedure.

32 Against that background, the question whether the relationship of control at issue influenced the respective content of the tenders submitted by the undertakings concerned in the same public procurement procedure requires an examination and assessment of the facts which it is for the contracting authorities to carry out. A finding of such influence, in any form, is sufficient for those undertakings to be excluded from the procedure in question. However, a mere finding of a relationship of control between the undertakings concerned, by reason of ownership or the number of voting rights exercisable at ordinary shareholders' meetings is not sufficient for the contracting authority to automatically exclude those undertakings from the procedure for the award of the contract, without ascertaining whether such a relationship had a specific effect on their conduct in the course of that procedure.

33 Having regard to all the foregoing considerations, the answer to the question referred is that:

- the first paragraph of Article 29 of Directive 92/50 must be interpreted as not precluding a Member State from laying down, in addition to the grounds for exclusion contained in that provision, other grounds for exclusion intended to guarantee respect for the principles of equality of treatment and transparency, provided that such measures do not go beyond what is necessary to achieve that objective, and

- Community law precludes a national provision which, while pursuing legitimate objectives of equality of treatment of tenderers and transparency in procedures for the award of public contracts, lays down an absolute prohibition on simultaneous and competing participation in the same tendering procedure by undertakings linked by a relationship of control or affiliated to one another, without allowing them an opportunity to demonstrate that that relationship did not influence their conduct in the course of that tendering procedure.

Costs

- ³⁴ 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:

The first paragraph of Article 29 of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts must be interpreted as not precluding a Member State from laying down, in addition to the grounds for exclusion contained in that provision, other grounds for exclusion intended to guarantee respect for the principles of equality of treatment and transparency, provided that such measures do not go beyond what is necessary to achieve that objective.

Community law precludes a national provision which, while pursuing legitimate objectives of equality of treatment of tenderers and transparency in procedures for the award of public contracts, lays down an absolute prohibition on simultaneous and competing participation in the same tendering procedure by undertakings linked by a relationship of control or affiliated to one another, without allowing them an opportunity to demonstrate that that relationship did not influence their conduct in the course of that tendering procedure.

[Signatures]