

JUDGMENT OF THE COURT (Fourth Chamber)

23 December 2009*

In Case C-376/08,

REFERENCE for a preliminary ruling under Article 234 EC from the Tribunale amministrativo regionale per la Lombardia (Italy), made by decision of 2 April 2008, received at the Court on 18 August 2008, in the proceedings

Serrantoni Srl,

Consorzio stabile edili Scrl

v

Comune di Milano,

* Language of the case: Italian.

intervening parties:

Bora Srl Construzioni edili,

Unione consorzi stabili Italia (UCSI),

Associazione nazionale imprese edili (ANIEM),

THE COURT (Fourth Chamber),

composed of K. Lenaerts, President of the Third Chamber, acting as the President of the Fourth Chamber, R. Silva de Lapuerta, E. Juhász (Rapporteur), G. Arestis and T. von Danwitz, Judges,

Advocate General: J. Kokott,
Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— the Commission of the European Communities, by C. Zadra and D. Recchia, acting as Agents,

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

gives the following

Judgment

- 1 This reference for a preliminary ruling concerns the interpretation of Article 4 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), Articles 39 EC, 43 EC, 49 EC and 81 EC, and the general principles of equal treatment and proportionality.

- 2 The reference was made in the course of proceedings between the construction company Serrantoni Srl ('Serrantoni') and the Comune di Milano (Municipality of Milan), regarding the decision of the Comune di Milano to exclude Serrantoni from participating in a procedure for the award of a public works contract.

Legal context

Community legislation

3 Recital 2 in the preamble to 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 [EC] 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. However, for public contracts above a certain value, it is advisable to draw up provisions of Community coordination of national procedures for the award of such contracts which are based on these principles so as to ensure the effects of them and to guarantee the opening-up of public procurement to competition. These coordinating provisions should therefore be interpreted in accordance with both the aforementioned rules and principles and other rules of the Treaty.’

4 Article 2 of that directive provides:

‘Contracting authorities shall treat economic operators equally and non-discriminately and shall act in a transparent way.’

5 Article 4 of the directive, under the heading ‘Economic operators’, provides:

‘1. Candidates or tenderers who, under the law of the Member State in which they are established, are entitled to provide the relevant service, shall not be rejected solely on the ground that, under the law of the Member State in which the contract is awarded, they would be required to be either natural or legal persons.

...

2. Groups of economic operators may submit tenders or put themselves forward as candidates. In order to submit a tender or a request to participate, these groups may not be required by the contracting authorities to assume a specific legal form; however, the group selected may be required to do so when it has been awarded the contract, to the extent that this change is necessary for the satisfactory performance of the contract.’

6 In accordance with the version of Article 7(c) of Directive 2004/18 in force at the material time as a result of the adaptation effected by Commission Regulation (EC) No 2083/2005 of 19 December 2005 amending Directives 2004/17/EC and 2004/18/EC of the European Parliament and of the Council in respect of their application thresholds for the procedures for the award of contracts (OJ 2005 L 333, p. 28), Directive 2004/18 applied to public works contracts which had a value exclusive of value added tax estimated to be equal to or greater than EUR 5 278 000.

7 Article 45 of that directive, headed 'Personal situation of the candidate or tenderer', provides in paragraph 2:

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

- (a) is bankrupt or is being wound up, where his affairs are being administered by the court, where he has entered into an arrangement with creditors, where he has suspended business activities or 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 of an arrangement with creditors or of any other similar proceedings under national laws and regulations;
- (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 proven by any means which the contracting authorities can demonstrate;
- (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 in which he is established or with those of the country of the contracting authority;

- (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.’

National legislation

- 8 Legislative Decree No 163 of 12 April 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 (Codice dei contratti pubblici relativi a lavori, servizi e forniture in attuazione delle direttive 2004/17/CE e 2004/18/CE) (Ordinary Supplement to GURI No 100 of 2 May 2006, ‘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. Article 34 of that legislative decree, as amended by Legislative Decree No 113 of 31 July 2007, entitled ‘Entities to which public contracts may be awarded’, provides in paragraph 1:

‘1. Without prejudice to the restrictions expressly provided for, the following entities are entitled to participate in the procedures for the award of public procurement contracts:

...

- (b) consortia of producers' and workers' cooperatives ... and consortia of artisan/handicraft businesses ...;

- (c) permanent consortia, constituted as joint venture companies..., between individual contractors (including artisans), commercial companies or partnerships or producers' and workers' cooperatives, in accordance with the provisions of Article 36;

...

- (f) entities which have entered into a European Economic Interest Group [EEIG] ...;

- (f a) economic operators ... established in other Member States and constituted according to the applicable legislation of the Member State concerned.'

9 Article 36(1) of Legislative Decree No 163/2006 provides:

“Permanent consortia” (“consorzi stabili”) mean those ... which, by a decision of their respective management, have agreed to participate jointly in public works contracts,

public service contracts and public supply contracts, for a period of not less than five years, creating a joint undertaking structure for that purpose.’

- 10 Article 36(5) of Legislative Decree No 163/2006, in the version in force at the material time, provided:

‘... a permanent consortium may not participate in the same award procedure as members of that consortium; in the event of failure to comply with this provision, Article 353 of the Criminal Code shall apply...’.

- 11 Article 37(7) of that legislative decree, in the version in force at the material time, provided:

‘... The consortia referred to in Article 34(1)(b) are required to specify in the tender the members for which the consortium is competing; those members are precluded from participating, in any other form, in the same tendering procedure; in the event of infringement, both the consortium and the member shall be excluded from the procedure; in the event of failure to comply with this provision, Article 353 of the Criminal Code shall apply ...’

- 12 Under Article 353 of the Criminal Code, the failure to comply with the above prohibition is punishable by up to two years’ imprisonment and, in certain circumstances by up to five years’ imprisonment, and by a fine.

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

- 13 In 2007 the Comune di Milano issued a call for tenders relating to the award of a works contract concerning 'emergency and rationalisation measures for district registry offices, lot V'. On 27 September 2007, the Comune di Milano decided to exclude Serrantoni, a member of the permanent consortium Consorzio stabile edili Scrl, as well as the permanent consortium itself, from the tendering procedure for breach of Article 36(5) of Legislative Decree No 163/2006. On the basis of the same provision, the Comune di Milano also ordered the documents to be forwarded to the Public Prosecutor's office for the application of Article 353 of the Criminal Code, and awarded the contract to another company.
- 14 Serrantoni and the permanent consortium to which it belongs brought an appeal before the referring court against that decision of the contracting authority, submitting that Article 36(5) of Legislative Decree No 163/2006 is incompatible with Article 4 of Directive 2004/18, Articles 39 EC, 43 EC, 49 EC and 81 EC, and with the principle of non-discrimination.
- 15 The referring court points out, first of all, that the national legislation at issue in the main proceedings makes a distinction between permanent consortia, on the one hand, and consortia of producers' and workers' cooperatives and consortia of artisan/handicraft businesses, on the other. As regards permanent consortia, there is an absolute prohibition on the consortium and the companies forming part thereof participating in the same procedure simultaneously by separate tenders, on pain of automatic exclusion from the procedure and criminal sanctions. As regards the consortia of producers' and workers' cooperatives and consortia of artisan/handicraft businesses, that prohibition applies only to the consortium and the company in whose interests that consortium submitted a tender in the tendering procedure in question. That court observes that, in the case at issue in the main proceedings, the permanent consortium in question did not participate in the call for tenders in Serrantoni's interests.

- 16 The referring court notes, next, that the different forms of consortium referred to above do not exhibit any differences in respect of their aims and organisation that would justify such unequal treatment. All those forms of consortium are characterised by a common organisation for the purposes of instituting cooperation between the member companies in order to reduce management costs, to optimise their respective economic results and to increase their competitiveness in relation to public contracts. The referring court therefore asks whether the difference in treatment in question is compatible with the principle of non-discrimination and with the Community requirement to ensure the widest possible participation in public tendering procedures.
- 17 The referring court also asks whether that difference in treatment is compatible with Article 4 of Directive 2004/18, to the extent that the exclusion in question is based solely on the fact that the entity takes the legal form of a permanent consortium, and with Articles 39 EC, 43 EC, 49 EC and 81 EC. That discrimination is moreover of particular importance since the institution of consortia has been amply provided for in the legal systems of the other Member States and finds expression at the Community level in the form of European Economic Interest Groupings (EEIGs).
- 18 Lastly, the referring court points out that the absolute prohibition in question is based exclusively on a formal aspect, that is to say whether a company forms part of a particular type of group. The legislation in question makes no call for a specific assessment of the mutual influence exerted between consortium and member company but, on the contrary, posits an abstract presumption of mutual interference. Thus, that court notes, even if the consortium is not participating in the tendering procedure in the interests of the company concerned, is not using the company for the execution of the contract, and therefore has no agreement with that company concerning the submission of the tender, the absolute prohibition is applicable. It therefore asks whether that absolute prohibition may be justified by an overriding requirement in the general interest relating to the need to ensure that public tendering procedures are properly conducted, and whether it does not go far beyond its objective.

19 In the light of those considerations, the Tribunale amministrativo regionale per la Lombardia (Regional Administrative Court, Lombardy) decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

(1) Is the correct application of Article 4 of Directive 2004/18 ... impeded by the provisions of national law laid down in Article 36(5) of Legislative Decree No 163/2006 ..., under which:

- where a member of a consortium participates in a tendering procedure for a public contract, the consortium itself is automatically excluded from participation solely on the ground that it has a particular legal form (that of a permanent consortium) rather than another, essentially identical, legal form (that of a consortium of producers' and workers' cooperatives or a consortium of artisan/handicraft businesses); and

- where a permanent consortium participates in a tendering procedure for a public contract, and where it has declared that it is competing on behalf of other companies and that it will entrust the works to other companies if it is awarded the contract, a company is automatically excluded from participation solely on the formal ground that it is a member of that consortium?

(2) Is the correct application of Articles 39 EC, 43 EC, 49 EC and 81 EC impeded by the provisions of national law laid down in Article 36(5) of Legislative Decree No 163/2006 ..., under which:

- where a member of a consortium participates in a tendering procedure for a public contract, the consortium itself is automatically excluded from participation solely on the ground that it has a particular legal form (that of a permanent consortium) rather than another, essentially identical, legal form (a consortium of producers' and workers' cooperatives or a consortium of artisan/handicraft businesses), and

- where a permanent consortium participates in a tendering procedure for a public contract, and where it has declared that it is competing on behalf of other companies and that it will entrust the works to other companies if it is awarded the contract, a company is automatically excluded from participation solely on the formal ground that it is a member of that consortium?

The questions referred for a preliminary ruling

²⁰ First of all, it should be observed that, as is clear from the file submitted to the Court, the value of the contract to which the award procedure at issue in the main proceedings relates is considerably lower than the threshold laid down in Article 7(c) of Directive 2004/18. Consequently, that contract does not fall within the scope of the procedures laid down in that directive.

²¹ None the less, it should be recalled that the fact that the value of a contract is below the threshold set by the Community rules does not, however, mean that that contract is not subject at all to the application of Community law.

- 22 It is clear from the Court's settled case-law that, in the context of the award of a contract with a value below that threshold, the fundamental rules of the Treaty and in particular the principle of equal treatment must be complied with. The distinguishing feature in relation to contracts with a value above the threshold prescribed by the provisions of Directive 2004/18 is that only the latter are subject to the strict special procedures laid down in those provisions (see, to that effect, Joined Cases C-147/06 and C-148/06 *SECAP and Santorso* [2008] ECR I-3565, paragraphs 19 and 20).
- 23 That interpretation is confirmed by recital 2 in the preamble to Directive 2004/18, which states that the award of all contracts concluded in the Member States on behalf of bodies with the status of a contracting authority must comply with the basic rules of the Treaty, and in particular with those concerning freedom of movement of goods and services, the right of establishment and the fundamental principles deriving therefrom, such as the principles of equal treatment, proportionality and transparency.
- 24 However, according to the case-law of the Court, the application of the fundamental rules and general principles of the Treaty to procedures for the award of contracts below the threshold for the application of Community provisions is based on the premiss that the contracts in question are of certain cross-border interest (*SECAP and Santorso*, paragraph 21 and case-law cited).
- 25 In that connection, the Court has already pointed out that it is for the referring court to carry out a detailed assessment of all the relevant facts concerning the contract in question in order to determine whether there is certain cross-border interest (*SECAP and Santorso*, paragraph 34). In the present case, the answers to the questions referred take as their premiss that it is none the less for the referring court to ascertain whether the contract in question involves certain cross-border interest.

The first question

- 26 By this question, the referring court asks whether Article 4 of Directive 2004/18 must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which provides that both a permanent consortium and its member companies are automatically excluded from participating in a procedure for the award of a public contract and face criminal sanctions where the member companies have submitted tenders in competition with that consortium's tender in the context of the procedure in question, even if the consortium's tender was not submitted on behalf and in the interests of those companies.
- 27 In that connection, as has been noted in paragraph 20 of this judgment, the contract at issue in the main proceedings does not fall within the scope of the procedures laid down in that directive, since its value is below the threshold laid down in Article 7(c) of Directive 2004/18.
- 28 Accordingly, there is no need to answer the question referred by the national court.

The second question

- 29 By this question, considered in the light of the reference for a preliminary ruling taken as a whole, the referring court asks whether the general principles of equal treatment and proportionality deriving from Articles 43 EC and 49 EC and Articles 39 EC and 81 EC must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which provides that both a permanent consortium and its member companies are automatically excluded from participating in a procedure for the award of a public contract and face criminal sanctions where the member companies have submitted tenders in competition with the consortium's tender in the context of the

same procedure, even if that consortium's tender was not submitted on behalf and in the interests of those companies.

30 As regards the Treaty articles to which the national court refers, it should be noted, first of all, that the exclusion at issue in the main proceedings has no connection with freedom of movement for workers, or with agreements between undertakings or decisions by associations of undertakings, within the meaning of Articles 39 EC and 81 EC. There is therefore no need for the Court to give an answer with regard to those articles.

31 As regards the principles of equal treatment and transparency, the Member States must be recognised as having a certain amount of discretion for the purpose of adopting measures intended to ensure compliance with those principles, which are binding on contracting authorities in any procedure for the award of a public contract (see, to that effect, Case C-213/07 *Michaniki* [2008] ECR I-9999, paragraph 44).

32 Each Member State is best placed to identify, in the light of historical, legal, economic or social considerations specific to it, situations propitious to conduct liable to bring about breaches of those principles (see *Michaniki*, paragraph 56).

33 However, in accordance with the principle of proportionality, which constitutes a general principle of Community law (see, inter alia, Case C-210/03 *Swedish Match* [2004] ECR I-11893, paragraph 47), the measures adopted by the Member States must not go beyond what is necessary to achieve that objective (see, to that effect, *Michaniki*, paragraphs 48 and 61, and Case C-538/07 *Assitur* [2009] ECR I-4219, paragraphs 21 and 23).

34 First, as regards the principles of equal treatment and of proportionality, it should be noted that the legislation at issue in the main proceedings provides for the automatic exclusion from participation in a public tendering procedure in the event of simultaneous and competing tenders submitted by a permanent consortium and by one or more companies forming part thereof.

35 In that connection, it must be pointed out that the automatic exclusion at issue in the main proceedings is only applicable to permanent consortia and the companies of which they are composed, and not to other forms of consortium, such as consortia of producers' and workers' cooperatives and consortia of artisan/handicraft businesses. As regards the latter forms of consortium, the exclusion is applicable, in accordance with Article 37(7) of Legislative Decree No 163/2006, only where competing tenders are submitted by the consortium in question and by those of its member companies on whose behalf the consortium itself has submitted a tender.

36 In that connection, the referring court notes that all those forms of consortium are essentially identical and do not exhibit any differences in respect of their aims and organisation that would justify such unequal treatment.

37 It must therefore be found that the automatic exclusion measure at issue in the main proceedings, which concerns only the permanent consortium form and its member companies and is applicable in the event of competing tenders, regardless of whether the consortium concerned participates in the public tendering procedure in question on behalf and in the interests of the companies which have submitted a tender, constitutes discrimination against that form of consortium, and does not therefore comply with the principle of equal treatment.

38 It should be added that, even if the treatment in question applied without distinction to all forms of consortium, or the national court found that there were objective elements which distinguished the situation of permanent consortia from that of other forms of

consortium, a rule requiring automatic exclusion, such as the rule at issue in the main proceedings, would not in any event be compatible with the principle of proportionality.

39 A rule of that kind involves an irrebutable presumption of mutual interference in cases in which a consortium and one or more of its member companies have submitted competing tenders in the same procedure for the award of a public contract, even where the consortium in question has not participated in the procedure on behalf and in the interests of those companies, without either the consortium or the companies concerned being afforded the possibility of showing that their tenders were drawn up completely independently and that there is therefore no risk of influencing competition between tenderers (see, to that effect, *Michaniki*, paragraph 67, and *Assitur*, paragraph 30, in relation to the public contracts falling within the scope 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) and 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).

40 A systematic rule of exclusion, which also entails an absolute obligation on the contracting authorities to exclude the entities concerned, even in cases in which the relationship between those entities has no effect on their conduct in the context of the procedures in which they have participated, is contrary to the Community interest in ensuring the widest possible participation by tenderers in a call for tenders, and goes beyond what is necessary to achieve the objective of ensuring the application of the principles of equal treatment and transparency (see, to that effect, *Assitur*, paragraphs 26 to 29, with regard to public contracts falling within the scope of Directive 92/50).

41 Second, it should be noted that, in accordance with the settled case-law of the Court, Articles 43 EC and 49 EC preclude any national measure which, even though it is applicable without discrimination on grounds of nationality, is liable to prohibit, impede or render less attractive the exercise by Community nationals of the freedom of

establishment and the freedom to provide services guaranteed by those provisions of the Treaty (see, to that effect, Case C-299/02 *Commission v Netherlands* [2004] ECR I-9761, paragraph 15, and Case C-433/04 *Commission v Belgium* [2006] ECR I-10653, paragraph 28).

42 As the Commission of the European Communities rightly observes, a national rule such as that at issue in the main proceedings, which provides that permanent consortia and their member companies may be automatically excluded, is likely to have a dissuasive effect on economic operators established in other Member States, that it so to say, first, on operators wishing to establish themselves in the Member State concerned through the establishment of a permanent consortium, possibly composed of national and foreign companies, and, second, on operators intending to join consortia of that kind already in existence, in order to be able to participate more easily in public tendering procedures launched by the contracting authorities of that Member State and thereby be able to offer their services more easily.

43 A national measure of that kind which is likely to have a dissuasive effect on economic operators established in other Member States constitutes a restriction within the meaning of Articles 43 EC and 49 EC (see, to that effect, *Commission v Belgium*, paragraph 29), all the more so as that dissuasive effect is heightened by the risk of criminal sanctions which are laid down in the national legislation at issue in the main proceedings.

44 However, a restriction such as that at issue in the main proceedings may possibly be justified in so far as it pursues a legitimate objective in the public interest, and to the extent that it is suitable for securing the attainment of the objective and does not go beyond what is necessary in order to attain it.

45 In the present case, it must be found that, notwithstanding its legitimate objective of combating possible collusion between the consortium concerned and its member companies, the restriction in question cannot be justified since, as is clear from paragraphs 38 to 40 of this judgment, it goes beyond what is necessary to achieve that objective.

⁴⁶ The answer to the second question must therefore be that Community law must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which provides that, when a public contract is being awarded, with a value below the threshold laid down in Article 7(c) of Directive 2004/18 but of certain cross-border interest, both a permanent consortium and its member companies are automatically excluded from participating in that procedure and face criminal sanctions where those companies have submitted tenders in competition with the consortium's tender in the context of the same procedure, even if the consortium's tender was not submitted on behalf and in the interests of those companies.

Costs

⁴⁷ 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:

Community law must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which provides that, when a public contract is being awarded, with a value below the threshold laid down in Article 7(c) 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, but of certain cross-border interest, both a permanent consortium and its member companies are

automatically excluded from participating in that procedure and face criminal sanctions where those companies have submitted tenders in competition with the consortium's tender in the context of the same procedure, even if the consortium's tender was not submitted on behalf and in the interests of those companies.

[Signatures]