Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

14 December 2016*

(Reference for a preliminary ruling — Public service contracts — Directive 2004/18/EC — Article 45(2) — Personal situation of the candidate or tenderer — Optional grounds of exclusion — Grave professional misconduct — National legislation providing for a case-by-case assessment in accordance with the principle of proportionality — Decisions of the contracting authorities — Directive 89/665/EEC — Judicial review)

In Case C-171/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Hoge Raad der Nederlanden (Supreme Court, Netherlands), made by decision of 27 March 2015, received at the Court on 15 April 2015, in the proceedings

**Connexxion Taxi Services BV**

v

**Staat der Nederlanden (Ministerie van Volksgezondheid, Welzijn en Sport),**

**Transvision BV,**

**Rotterdamse Mobiliteit Centrale RMC BV,**

**Zorgvervoercentrale Nederland BV,**

THE COURT (Fourth Chamber),

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

Advocate General: M. Campos Sánchez-Bordona,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 27 April 2016,

after considering the observations submitted on behalf of:

— Connexxion Taxi Services BV, by J. van Nouhuys, advocaat,

— Transvision BV, Rotterdamse Mobiliteit Centrale RMC BV and Zorgvervoercentrale Nederland BV, J.P. Heering and P. Heemskerk, advocaten,

* * Language of the case: Dutch.

— the Netherlands Government, by H.M. Stergiou, M.K. Bulterman, A.M. de Ree and J. Langer, acting as Agents,

— the Italian Government, by G. Palmieri, acting as Agent, S. Varone and F. Di Matteo, avvocati dello Stato,

— the European Commission, by A. Tokár and S. Noë, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 30 June 2016,

gives the following

## Judgment

1 This request for a preliminary ruling concerns the interpretation of the provisions of Article 45(2) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114) and the general principles of equal treatment and proportionality and the extent of judicial review of the powers of contracting authorities.

2 The request has been made in proceedings between Connexxion Taxi Services BV ('Connexxion') and the Staat der Nederlanden — Ministerie van Volksgezondheid, Welzijn en Sport (Netherlands State — Ministry of Health, Welbeing and Sport, 'the Ministry') and the tender group constituted by Transvision BV, Rotterdamse Mobiliteit Centrale RMC BV and Zorgvervoercentrale Nederland BV ('the Tender Group') concerning the lawfulness of the Ministry's decision to award a public services contract to the Tender Group.

### Legal context

*EU 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. 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, entitled 'Principles of awarding contracts' provides:

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

5 Under Title II, Section 2 of Chapter VII of that directive concerns 'Criteria for qualitative selection'. It includes Article 45, entitled 'Personal situation of the candidate or tenderer'. Article 45(1) lists the reasons for which a candidate or tenderer must be excluded from participating in a contract. Article 45(2) lists the reasons for which a candidate or tenderer may be excluded from participation in a contract and was worded as follows:

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

…

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

…

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

6 Annex VII A to that directive, entitled ' Information which must be included in public contract notices' refers, in point 17, to 'selection criteria regarding the personal situation of economic operators that may lead to their exclusion, and required information proving that they do not fall within the cases justifying exclusion …'.

7 Under the heading 'Scope and availability of review procedures', Article 1 of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33) as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 (OJ 2007 L 335, p. 31) provides in paragraph 1(3) thereof:

'Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of Directive 2004/18/EC, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 2 to 2f of this Directive, on the ground that such decisions have infringed Community law in the field of public procurement or national rules transposing that law.'

8 Directive 2004/18 was replaced by Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18 (OJ 2014 L 94, p. 65). In accordance with Article 91 of Directive 2014/24, Directive 2004/18 was repealed with effect from 18 April 2016.

*Netherlands law*

9 Directive 2004/18 was transposed into Netherlands law by the Besluit houdende regels betreffende de procedures voor het gunnen van overheidspdrachten voor werken, lveringen en diensten (Decree relating to the rules on the award of public contracts) of 16 July 2005 (Stb. 2005, p. 408 'the Decree').

10 Article 45(2)(d) of that directive was transposed into Netherlands law by Article 45(3)(d) of the Decree which states as follows:

‘The contracting authority may exclude from participation in a public contract any economic operator:

…

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

…’

11 The Explanatory Memorandum to the decree states, with regard to Article 45(3) thereof:

‘The assessment of whether exclusion should actually take place and for how long that exclusion should last should, having regard to the general principles of Directive 2004/18, always be proportionate and non-discriminatory. “Proportionate” means that the exclusion and its length must be proportional to the gravity of the misconduct. In the same way, the exclusion and its length must be proportionate to the size of the public contract. Setting a mandatory period in which an undertaking which acted unlawfully is excluded from the outset from all public procurement procedures by the State is not, therefore, consistent with the principle of proportionality. That also means that the assessment is made on an individual basis, because the contracting authority must always verify on a case-by-case basis for each public contract whether, in a specific case, a particular undertaking must be excluded (in accordance with the nature and size of the contract, the nature and extent of the fraud and the measures that the undertaking has adopted in the meantime).’

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

12 On 10 July 2012, the Ministry launched a contract award procedure for the supply of ‘socio-recreational interregional transport services for persons with reduced mobility’. The service is intended to enable persons with reduced mobility to travel freely by giving them a transport budget each year expressed in taxi kilometres. The contract has a minimum duration of three years and nine months and is valued annually at approximately EUR 60 000 000.

13 The award procedure for that contract is described in detail, in a document called ‘Descriptive document’, the paragraph of which entitled ‘Grounds for Exclusion and Suitability Requirements’ states inter alia as follows in point 3.1:

‘A Tender to which a Ground for Exclusion applies shall be set aside and shall not be eligible for further (substantive) assessment.’

14 As far as concerns the grounds for exclusion, the Descriptive document refers to a ‘self-declaration’ that tenderers must make and attach to their tender as an annex. The descriptive document states:

‘The tenderer hereby declares … that no grounds for exclusion (see paragraphs 2 and 3 of the declaration) apply to him; this is confirmed by signature of the Uniform Self-declaration — Tenders.’

15 By that declaration, the tenderer declares, inter alia, that ‘neither his company nor any manager has been guilty of grave professional misconduct’.

16 Connexxion and the Tender Group were among the companies that participated in the award procedure for that contract. By letter of 8 October 2012, the Ministry informed Connexxion that its bid was in second position, but that the Ministry intended to award the contract to the Tender Group.

17 On 20 November 2012, the Nederlandse Medeingingsautoriteit (Netherlands Competition Authority) imposed fines on two undertakings in the Tender Group and on the managers of those undertakings for infringement of Netherlands competition law. The infringements established concerned agreements concluded with other undertakings during the periods from 18 December 2007 to 27 August 2010 and from 17 April 2009 to 1 March 2011. The Ministry took the view that this constituted grave professional misconduct but maintained its decision to award the contract to the Tender Group, on the ground that the Tender Group's exclusion on the basis of such misconduct would be disproportionate.

18 In proceedings for interim measures, Connexxion sought an order prohibiting the Ministry from awarding the contract to the Tender Group. By decision of 17 April 2013, the voorieningenrechter te Den Haag (the court hearing the application for interim measures, The Hague) upheld Connexxion's request, taking the view that the Ministry, having established that the Tender Group had been guilty of grave professional misconduct, no longer had any latitude to carry out a review of proportionality.

19 By decision of 3 September 2013, the Gerechtshof Den Haag (Court of Appeal, The Hague, Netherlands) set aside the decision of the court hearing the application for interim relief and authorised the Ministry to award the contract at issue in the main proceedings to the Tender Group. It held, first, that EU law does not preclude a contracting authority from assessing, in accordance with the principle of proportionality, whether a tenderer to which an optional ground of exclusion applies must be excluded and, second, that by carrying out such an examination of proportionality, the Ministry has not acted in disregard of the principles of equal treatment and transparency.

20 Connexxion brought an appeal against that decision before the Hoge Raad der Nederlanden (Supreme Court, Netherlands).

21 That court observes that the case in the main proceedings is characterised, first, by the fact that, in the tender conditions, the contracting authority stated that the tender to which a ground of exclusion applies is to be rejected without consideration of the substance and, second, that the decision to award the contract to a particular tenderer was nevertheless maintained after the contracting authority established that that tenderer had been guilty of grave professional misconduct for the purposes of the tender conditions.

22 The referring court states that Article 45(3) of the Decree reproduces in their entirety the optional grounds of exclusion laid down in Article 45(2), first subparagraph, of Directive 2004/18. As far as concerns the application of the grounds of exclusion, it is clear from the Explanatory Memorandum regarding that provision of the Decree that, taking account of the general principles of the directive, the question whether a tenderer is to be excluded must always be determined in a proportionate and non-discriminatory manner. Thus, contracting authorities should assess, on a case-by-case basis, whether an undertaking must be excluded from the relevant public procurement procedure, taking account of the nature and size of the contract, the nature and extent of the fraud, and the measures that the undertaking has taken in the meantime.

23 Accordingly, national law requires the contracting authority, after it has established that a tenderer has been guilty of grave professional misconduct, to decide, in accordance with the principle of proportionality, whether the perpetrator of that misconduct must in fact be excluded.

24 Therefore, the obligation to carry out an assessment of proportionality may be regarded as making the criteria for the application of the optional grounds of exclusion more flexible, as provided for by national law, within the meaning of the judgments of 9 February 2006, *La Cascina and Others* (C-226/04 and C-228/04, EU:C:2006:94, paragraph 21), and of 10 July 2014, *Consorzio Stabile Libor Lavori Pubblici* (C-358/12, EU:C:2014:2063, paragraphs 35 and 36). In accordance with Article 45(2), second subparagraph, of Directive 2004/18 such flexibility, provided for by national law, should comply with EU law and, in particular, with the principles of equal treatment and transparency. In the case in the main proceedings, the Ministry, as the contracting authority, after establishing that the tenderer had been guilty of grave professional misconduct, assessed, in accordance with the principle of proportionality, whether the professional honesty and reliability of the Tender Group could be guaranteed in the performance of the contract concerned. The Tender Group has taken measures to that effect.

25 The referring court points out that to date, the Court has not yet adjudicated on whether EU law, in particular Article 45(2) of that directive, precludes a contracting authority from being obliged to assess under national law, and in accordance with the principle of proportionality, whether a tenderer which has been guilty of grave professional misconduct should be excluded from a contract. The Court has also not adjudicated on the importance to be attached, in that regard, to the fact that, in the tender conditions, the contracting authority has provided for the rejection, without any examination of the substance, of any tender to which a ground of exclusion applies. Furthermore, that directive does not contain any provision concerning the extent of judicial review of the decisions taken by the contracting authorities.

26 In those circumstances, the Hoge Raad der Nederlanden (Supreme Court, Netherlands) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘1(a) Does EU law, in particular Article 45(2) of Directive 2004/18, preclude national law from obliging a contracting authority to assess, by application of the principle of proportionality, whether a tenderer which has been guilty of grave professional misconduct must indeed be excluded?

1(b) Is it significant in this regard that a contracting authority has stated in the tender conditions that a tender to which a ground for exclusion applies must be set aside and is not to be eligible for further substantive assessment?

If the answer to Question 1(a) is in the negative: does EU law preclude a situation in which the national courts fail to carry out an unrestricted judicial review of an assessment conducted on the basis of the principle of proportionality, such as the assessment conducted by a contracting authority in the present case, but merely carry out a (“marginal”) review as to whether the contracting authority could reasonably have come to the decision not to exclude a tenderer notwithstanding the fact that that tenderer has been guilty of grave professional misconduct within the meaning of the first subparagraph of Article 45(2) of Directive 2004/18?’

## Consideration of the questions referred

27 As a preliminary point, it must be stated that the facts at issue in the main proceedings, as set out in paragraphs 12 to 17 above, arose before the expiry on 18 April 2016 of the period within which the Member States were to transpose Directive 2014/24. It follows that the questions referred for a preliminary ruling must be determined *ratione temporis* solely in the light of Directive 2004/18, as interpreted by the case-law of the Court.

*Consideration of Question 1(a)*

28 According to settled case-law, as regards public contracts falling within the scope of Directive 2004/18, Article 45(2) thereof leaves the application of the seven grounds for excluding candidates from participation in a contract, relating to their professional honesty, solvency and reliability, to the determination of the Member States, as evidenced by the phrase 'may be excluded from participation in a contract', which appears at the beginning of that provision (see, as far as concerns 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), judgment of 9 February 2006, *La Cascina and Others*, C-226/04 and C-228/04, EU:C:2006:94, paragraph 21). Furthermore, pursuant to Article 45(2), second subparagraph, the Member States must specify the conditions for applying paragraph 2, in accordance with their national law and in compliance with EU law (judgment of 10 July 2014, *Consorzio Stabile Libor Lavori Pubblici*, C-358/12, EU:C:2014:2063, paragraph 35).

29 Therefore, 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 at all 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, the Member States have the power to make the criteria laid down in Article 45(2) less onerous or more flexible (judgment of 10 July 2014, *Consorzio Stabile Libor Lavori Pubblici*, paragraph 36 and the case-law cited).

30 In the present case, it must be observed that, as far as concerns the option to exclude an economic operator which has been guilty of grave professional misconduct, the Kingdom of the Netherlands has not set out in its legislation the conditions of applicability in Article 45(2), second subparagraph, of that directive, but, by the Decree, has conferred the exercise of that option on the contracting authorities. The Netherlands legislation at issue in the main proceedings gives the contracting authorities the choice to declare the optional grounds of exclusion, laid down in Article 45(2) of that directive, to be applicable to an award procedure for a public contract.

31 As far as concerns the grounds for excluding a tenderer which has been guilty of grave professional misconduct from a contract, it is clear from the order for reference that that legislation requires the contracting authority concerned, which establishes that the tenderer has been guilty of such misconduct, to determine, in accordance with the principle of proportionality, whether the tenderer should in fact be excluded.

32 Thus, it appears that that assessment of the proportionality of the exclusion makes the application of the ground of exclusion relating to grave professional misconduct laid down in Article 45(2)(d) of Directive 2004/18 more flexible, in accordance with the case-law cited in paragraph 29 of the present judgment. Furthermore, it follows from recital 2 thereof that the principle of proportionality applies in a general manner to public procurement procedures.

33 Therefore, the answer to Question 1(a) is that EU law, in particular Article 45(2) of Directive 2004/18, does not preclude national legislation, such as that at issue in the main proceedings, which requires a contracting authority to assess, in accordance with the principle of proportionality, whether it is in fact appropriate to exclude from a public contract a tenderer which has been guilty of grave professional misconduct.

*Consideration of Question 1(b)*

34 By Question 1(b), the referring court asks essentially whether the provisions of Directive 2004/18, read in the light of the principle of equal treatment, and the obligation of transparency deriving from it, must be interpreted as meaning that they preclude a contracting authority from deciding to award a

public contract to a tenderer which has been guilty of grave professional misconduct, on the ground that the exclusion of that tenderer from the award procedure would be contrary to the principle of proportionality, although, according to the conditions in the call for tenders for that contract, a tenderer who has been guilty of grave professional misconduct must necessarily be excluded without taking into account the proportionality of that sanction.

35 It is clear from the national legislation at issue in the main proceedings that the contracting authorities have a wide margin of discretion regarding the inclusion of the conditions of applicability in Article 45(2) of Directive 2004/18, providing for the optional ground of exclusion of an economic operator which has been guilty of grave professional misconduct, in the tendering documents and their application in practice.

36 It is conceivable that, when the contract documents are drafted, the contracting authority concerned may take the view, in accordance with the nature of that contract, the sensitive nature of the services which are its subject, and the requirements of professional honesty and reliability of the economic operators which arise from that, that the commission of grave professional misconduct must result in the automatic rejection of the tender and the exclusion of the tenderer at fault, provided that the principle of proportionality is observed when the seriousness of that misconduct is assessed.

37 Such a clause, inserted into the contract documents in unambiguous terms, as is the case with regard to the contract documents at issue in the main proceedings, enables all economic operators which are reasonably well informed exercising ordinary care to be apprised of the requirements of the contracting authority and the conditions of the contract so they may act accordingly.

38 As far as concerns whether, pursuant to the relevant national legislation, the contracting authority must or may assess, after the submission of the tenders or even after the selection of tenderers, whether an exclusion made in accordance with an exclusion clause on the ground of grave professional misconduct complies with the principle of proportionality, even though, according to the conditions of the call for tenders for that contract, a tenderer who has been guilty of grave professional misconduct must necessarily be excluded without taking account of the proportionality of that sanction, it must be recalled that the contracting authority must comply strictly with the criteria which it has itself laid down (see, to that effect, judgment of 10 October 2013, *Manova*, C-336/12, EU:C:2013:647, paragraph 40 and the case-law cited) in the light, in particular, of Annex VII A, paragraph 17, to Directive 2004/18.

39 Furthermore, the principle of equal treatment requires tenderers to be afforded equality of opportunity when formulating their tenders, which therefore implies that the bids of all tenderers must be subject to the same conditions (see, to that effect, judgment of 2 June 2016, *Pizzo*, C-27/15, EU:C:2016:404, paragraph 36).

40 Likewise, the obligation of transparency requires that all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner in the contract notice or specifications so that, first, all reasonably informed tenderers exercising ordinary care can understand their exact significance and interpret them in the same way and, second, the contracting authority is able to ascertain whether the tenders submitted satisfy the criteria applying to the contract in question (see, to that effect, judgment of 2 June 2016, *Pizzo*, C-27/15, EU:C:2016:404, paragraph 36 and the case-law cited).

41 As regards the examination of the proportionality of the exclusion at issue in the main proceedings, it must be observed that some of the economic operators concerned, although aware of the exclusion clause in the contract documents and knowing that they have been guilty of professional misconduct likely to be considered to be grave, may be tempted to submit a tender in the hope of being exempt from the exclusion on the basis of a subsequent assessment of their situation in the application of the

principle of proportionality, pursuant to the national legislation at issue in the main proceedings, while others, in a comparable situation, will not submit such a tender based on the terms of the exclusion clause which does not mention such an examination of proportionality.

42 The latter situation, in particular, is likely to concern the economic operators from other Member States who are less familiar with the terms and detailed rules of application of the relevant national legislation. That is particularly true in a situation, such as that at issue in the main proceedings, in which the contracting authority's obligation to carry out such an assessment of proportionality of an exclusion for grave professional misconduct does not derive from the terms of Article 45(3) of the Decree, but only from the Explanatory Memorandum relating to that provision. According to the information provided by the Netherlands Government in the proceedings before the Court, the Explanatory Memorandum is not binding itself, but must only be taken into consideration for the interpretation of that provision.

43 Therefore, the assessment of the exclusion at issue in the light of the principle of proportionality, where the tender conditions of the contract concerned provide for the rejection of tenders which are covered by such an exclusion clause without any assessment of that principle, is liable to place the economic operators concerned in an uncertain position and adversely affect the principle of equal treatment and compliance with the obligation of transparency.

44 Having regard to the foregoing considerations, the answer to Question 1(b) is that the provisions of Directive 2004/18, in particular those of Article 2 of and Annex VII A, point 17, thereto, read in the light of the principle of equal treatment and the obligation of transparency deriving from that, must be interpreted as precluding a contracting authority from deciding to award a public contract to a tenderer which has been guilty of grave professional misconduct on the ground that the exclusion of that tenderer from the award procedure would be contrary to the principle of proportionality, even though, according to the tender conditions of that contract, a tenderer which has been guilty of grave professional misconduct must necessarily be excluded, without consideration of the proportionality of that sanction.

*The second question*

45 Since the answer to Question 1(b) provides the information necessary for the national court to decide the dispute before it, there is no need to answer the second question.

## Costs

46 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:

1. **EU law, in particular Article 45(2) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, does not preclude national legislation, such as that at issue in the main proceedings, which requires a contracting authority to assess, in accordance with the principle of proportionality, whether it is in fact appropriate to exclude from a public contract a tenderer which has been guilty of grave professional misconduct.**

2. **The provisions of Directive 2004/18, in particular those of Article 2 of and Annex VII A, point 17, thereto, read in the light of the principle of equal treatment and the obligation of transparency which derives from that, must be interpreted as precluding a contracting authority from deciding to award a public contract to a tenderer which has been guilty of grave professional misconduct on the ground that the exclusion of that tenderer from the award procedure would be contrary to the principle of proportionality, even though, according to the tender conditions of that contract, a tenderer which has been guilty of grave professional misconduct must necessarily be excluded, without consideration of the proportionality of that sanction.**

[Signatures]