Reports of Cases

OPINION OF ADVOCATE GENERAL
Sharpston
delivered on 17 November 2015*

Case C-406/14

Wrocław - Miasto na prawach powiatu
v
Minister Infrastruktury i Rozwoju

(Request for a preliminary ruling from the Wojewódzki Sąd Administracyjny w Warszawie (Regional Administrative Court, Warsaw, Poland))

(Public procurement contracts — Directive 2004/18/EC — Tender specifications — Restriction on the use of subcontracting — Regulation (EC) No 1083/2006 — 'Irregularity' giving rise to compulsory financial corrections by the competent national authorities — Infringement of the procedure for the award of a public works contract))

1. The present request for a preliminary ruling arises out of a procedure initiated in May 2007 for the award of a public contract for the construction of a ring road in Wrocław (Poland). The project benefited from EU financial assistance. The City of Wrocław stipulated in the tender specifications that the successful tenderer was to perform at least 25% of the works covered by the contract using its own resources. The public authority in Poland competent to verify proper use of the EU funding took the view that that stipulation infringed the principle of fair competition and therefore was inconsistent with Directive 2004/18/EC.** As a consequence, that authority imposed on the City of Wrocław a flat rate correction of 5% of the amount of eligible costs borne by public funds.

2. The City of Wrocław challenges the financial correction before the Wojewódzki Sąd Administracyjny w Warszawie (Regional Administrative Court, Warsaw; 'the referring court'). The referring court seeks guidance, first, on whether Directive 2004/18, which aims in particular to guarantee the opening-up of public procurement to competition, precludes contracting authorities from restricting successful tenderers in their use of subcontracting. If a restriction on subcontracting such as that in issue in the main proceedings is inconsistent with that directive, the referring court

* Original language: English.

** 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). The version of Directive 2004/18 relevant to the facts in the main proceedings is that last amended by Council Directive 2006/97/EC of 20 November 2006 (OJ 2006 L 363, p. 107). Directive 2004/18 will be repealed and replaced, from 18 April 2016, by Directive 2014/24/EU of the European Parliament and the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65).

also wonders whether Council Regulation (EC) No 1083/2006*** requires the financial assistance awarded to that authority to be reduced even where it is not possible to determine precisely the loss suffered by the European Regional Development Fund, the European Social Fund or the Cohesion Fund ('the Funds').

European Union law

Directive 2004/18

3. Directive 2004/18 coordinates at EU level national procedures for the award of public contracts above a certain value.**** It aims to ensure the effects of the principles of freedom of movement of goods, freedom of establishment, and freedom to provide services and the principles deriving therefrom, including the principles of equal treatment, non-discrimination and transparency. It also aims to guarantee the opening-up of public procurement to competition.*****

4. Directive 2004/18 contains provisions on subcontracting in order to encourage the involvement of small and medium-sized undertakings in the public contracts procurement market.******

5. Article 1(2)(a) defines '[p]ublic contracts' as 'contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services within the meaning of [Directive 2004/18]'. Pursuant to Article 1(11)(b), '[r]estricted procedures' are 'those procedures in which any economic operator may request to participate and whereby only those economic operators invited by the contracting authority may submit a tender'.

6. Article 23(2) ('Technical specifications') provides: 'Technical specifications shall afford equal access for tenderers and not have the effect of creating unjustified obstacles to the opening-up of public procurement to competition.'

7. Pursuant to the first paragraph of Article 25 ('Subcontracting'), '[i]n the contract documents, the contracting authority may ask or may be required by a Member State to ask the tenderer to indicate in his tender any share of the contract he may intend to subcontract to third parties and any proposed subcontractors'.

8. Under Article 26 ('Conditions for performance of contracts'), '[c]ontracting authorities may lay down special conditions relating to the performance of a contract, provided that these are compatible with [EU] law and are indicated in the contract notice or in the specifications …'.

*** Of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999 (OJ 2006 L 210, p. 25). The version last amended by Council Regulation (EC) No 1989/2006 of 21 December 2006 (OJ 2006 L 411, p. 6) applied at the time of the facts in the main proceedings. Regulation No 1083/2006 was repealed, from 1 January 2014, by Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agriculture Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006 (OJ 2013 L 347, p. 320).

**** At the material time, Directive 2004/18 applied to public works contracts which had an estimated value of at least EUR 5 278 000 exclusive of VAT (Article 7(c)).

***** Recital 2.

****** Recital 32.

9. Article 44(2) ('Verification of the suitability and choice of participants and award of contracts') states that contracting authorities may require candidates and tenderers to meet minimum capacity levels which are related and proportionate to the subject-matter of the contract. An economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them, in order to demonstrate both its economic and financial standing (Article 47(2)) and its technical and/or professional ability (Article 48(3)). In that latter case, it must prove to the contracting authority that it will have at its disposal the resources necessary for the execution of the contract, for example by producing an undertaking by those entities. Evidence of the economic operators' technical abilities may be furnished, inter alia, by an indication of the technicians or technical bodies involved, whether or not belonging directly to the economic operator's undertaking, especially those upon whom the contractor can call in order to carry out the work in the case of public works contracts, or by an indication of the proportion of the contract which the services provider intends possibly to subcontract (Article 48(2)(b) and (i)).

Regulation No 2988/95

10. Article 1(1) of Council Regulation (EC, Euratom) No 2988/95******* provides: 'For the purposes of protecting the [European Union's] financial interests, general rules are hereby adopted relating to homogenous checks and to administrative measures and penalties concerning irregularities with regard to [EU] law.' Article 1(2) defines 'irregularity' as 'any infringement of a provision of [EU] law resulting from an act or omission by an economic operator, which has, or would have, the effect of prejudicing the general budget of the [European Union] or budgets managed by [it], either by reducing or losing revenue accruing from own resources collected directly on behalf of the [European Union], or by an unjustified item of expenditure'.

11. Article 2 provides in particular:

'1. Administrative checks, measures and penalties shall be introduced in so far as they are necessary to ensure the proper application of [EU] law. They shall be effective, proportionate and dissuasive so that they provide adequate protection for the [European Union's] financial interests.

2. No administrative penalty may be imposed unless [an EU act] prior to the irregularity has made provision for it. In the event of a subsequent amendment of the provisions which impose administrative penalties and are contained in [EU] rules, the less severe provisions shall apply retroactively.

3. [EU] law shall determine the nature and scope of the administrative measures and penalties necessary for the correct application of the rules in question, having regard to the nature and seriousness of the irregularity, the advantage granted or received and the degree of responsibility.

…'

Regulation No 1083/2006

12. Regulation No 1083/2006 lays down general rules governing the Funds, including principles and rules on financial management, monitoring and control on the basis of responsibilities shared between the Member States and the European Commission (Article 1).

******* Of 18 December 1995 on the protection of the European Communities' financial interests (OJ 1995 L 312, p. 1).

13. According to Article 3(1), action taken by the European Union under what is now Article 174 TFEU must be designed to strengthen the economic and social cohesion of the enlarged European Union in order to promote the harmonious, balanced and sustainable development of the Union. That action must be aimed at reducing the economic, social and territorial disparities which have arisen particularly in countries and regions whose development is lagging behind and in connection with economic and social restructuring and the ageing of the population.********

14. Article 2(7) defines 'irregularity' as 'any infringement of a provision of [EU] law resulting from an act or omission by an economic operator which has, or would have, the effect of prejudicing the general budget of the European Union by charging an unjustified item of expenditure to the general budget'.

15. Article 9(2) states in particular that the Commission and the Member States must ensure that assistance from the Funds is consistent with the activities, policies and priorities of the European Union. According to Article 9(5), operations which the Funds finance must therefore comply with the Treaties and acts adopted under them.*********

16. The first subparagraph of Article 14(1) states that the EU budget allocated to the Funds must be implemented within the framework of shared management between Member States and the Commission, in accordance with Article 53(1)(b) of the Financial Regulation.********** According to the second subparagraph of Article 14(1), the principle of sound financial management is to be applied in accordance with Article 48(2) of the Financial Regulation. Under that latter provision, the Member States must cooperate with the Commission so that the appropriations are used in accordance with the principle of sound financial management.

17. Pursuant to Article 98(1), which is in Title VII ('Financial management'), the Member States bear in the first instance responsibility for investigating irregularities, acting upon evidence of any major change affecting the nature or the conditions for the implementation or control of operations or operational programmes and making the financial corrections required.*********** Pursuant to Article 98(2), the Member State must make the financial corrections required in connection with the individual or systemic irregularities detected in operations or operational programmes. Those corrections consist of cancelling all or part of the public contribution to the operational programme, taking into account the nature and gravity of the irregularities and the financial loss to the Funds.

18. Article 99(1), which is also in Title VII, entitles the Commission to make financial corrections by cancelling all or part of the EU contribution to an operational programme in particular where, after carrying out the necessary examination, it concludes that a Member State has not complied with its obligations under Article 98 prior to the opening of the correction procedure.

Polish law

19. Pursuant to Article 7(1) of the Law on public contracts (Ustawa Prawo Zamówień Publicznych) of 29 January 2004, in the version relevant for the main proceedings, contracting authorities must prepare and conduct contract award procedures in a manner which preserves fair competition and equal treatment of economic operators.

******** See also recital 1.

********* See also recital 22.

********** Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 248, p. 1). See also recital 28 in the preamble to Regulation No 1083/2006.

*********** See also recital 65.

20. According to Article 36(4) of the Law on public contracts, the contracting authority requests the operator to indicate in its tender what proportion of the contract he may intend to subcontract. The contracting authority may, pursuant to Article 36(5), stipulate in the tender specifications which part of the contract cannot be subcontracted.

Facts, procedure and questions referred

21. On 18 May 2007, the Roads and Maintenance Board of the City of Wrocław initiated a restricted procedure for the award of a public contract for the construction of the Northern City Centre Ring Road. That project benefited from EU financial assistance under the 'Infrastructure and Environment' operational programme ('the operational programme').**********

22. Whilst seven economic operators requested to take part to that procedure, the City of Wrocław invited only five of them to tender. The tender specifications which were sent together with the invitation to tender contained the following stipulation: 'The economic operator is required to perform at least 25% of the works covered by the contract using its own resources' ('the 25% requirement'). Three economic operators submitted a tender.

23. On 1 August 2008, the City of Wrocław concluded a public works contract with the operator it had selected to implement the first part of the project ('the public works contract' or 'the contract').

24. In 2010, the City of Wrocław concluded an agreement with the director of the Centre for EU Transport Projects (Centrum Unijnych Projektów Transportowych; the 'CUPT') and the director of the City of Wrocław's Office for the Management of EU Funds (Biuro Zarządzania Funduszami Europejskimi Urzędu Miasta Wrocławia) in order to benefit from EU funding. The CUPT was responsible for monitoring the use of financial assistance awarded to the City of Wrocław under the operational programme,

25. The CUPT took the view that the City of Wrocław had infringed the principle of fair competition by imposing the 25% requirement. According to the CUPT, neither EU law nor national law authorised such a limitation on subcontracting. The CUPT therefore informed the City of Wrocław, on 24 May 2012, that it would apply a financial correction of 5% of the amount of the eligible costs borne by public funds (that is to say PLN 8600473.38, plus interest). The material before the Court indicates that the CUPT applied the 'Taryfikator', a table setting out different levels of flat rate financial correction depending on the type of irregularity.********** On 5 July 2012, the Minister for Transport, Construction and Maritime Affairs confirmed that correction.

26. The Minister for Regional Development rejected the City of Wrocław's appeal against the financial correction on 30 September 2013. According to the order for reference, she considered that contracting authorities were not authorised, under Article 36(5) of the Law on public contracts, to require the successful tenderer itself to carry out part of the contract specified in abstract terms as a percentage. The 25% requirement was also, in her view, at odds with Article 25 of Directive 2004/18. That irregularity justified making a financial correction under Regulation No 1083/2006.

********** Both the Cohesion Fund and the European Regional Development Fund financed the operational programme. See www.ec.europa.eu/regional_policy/fr/atlas/programmes/2007-2013/poland/operational-programme-infrastructure-and-environment.

********** The Commission submits that the level of financial correction applied in the main proceedings is consistent with its Guidelines for determining financial corrections to be made to expenditure co-financed by the Structural Funds or the Cohesion Fund for non-compliance with the rules on public procurement (Cocof 07/0037/03, 29 November 2007). Those Guidelines are available at: www.ec.europa.eu/regional_policy/sources/docoffic/official/guidelines/financial_correction/correction_2007_en.pdf.

27. The City of Wrocław's appeal against that decision is now pending before the referring court, which has stayed the proceedings and requested a preliminary ruling on the following questions:

'(1) In the light of Article 25 of Directive 2004/18 ... is the contracting authority allowed to stipulate in the tender specifications that the economic operator is required to perform at least 25% of the works covered by the contract using its own resources?

(2) If the answer to the first question is in the negative, does the application of the requirement described in that question in a procedure for the award of a public contract result in an infringement of provisions of EU law which justifies the need to make a financial correction pursuant to Article 98 of [Regulation No 1083/2006] ...?'

28. Written observations have been submitted by the City of Wrocław, the Austrian and Polish Governments and the Commission. No hearing has been requested and none has been held.

Analysis

Question 1: Restrictions on subcontracting under Directive 2004/18

29. It is common ground that the public works contract in issue in the main proceedings falls within the scope of Directive 2004/18. The City of Wrocław indicates that the successful tenderer proposed a gross price of PLN 257565599.68********** for those works, which is above the threshold that applied at the material time.**********

30. Directive 2004/18 is designed not only to avoid obstacles to freedom to provide services in the award of public service contracts or public works contracts but also to guarantee the opening-up of public procurement to competition.********** Recital 32 in the preamble to that directive states that the possibility of subcontracting is liable to encourage small and medium-sized undertakings to get involved in the public contracts procurement market. Subcontracting enables such undertakings to participate in tendering procedures and to be awarded public contracts regardless of the size of those contracts.********** Subcontracting thus contributes to achieving the directive's objectives by increasing the number of potential candidates for the award of public contracts.

31. Accordingly, Article 25 of Directive 2004/18 not only envisages that a tenderer may subcontract part of the contract but also sets no limit in that regard.********** Indeed, Directive 2004/18 confirms explicitly that an economic operator may, where appropriate and for a particular contract, rely on the economic, financial, technical and/or professional capacities of other entities, regardless of the legal nature of the links which it has with them.********** Consequently, a party may not be eliminated from a procedure for the award of a public service contract solely because it proposes, in order to carry out the contract, to use resources which are not its own but belong to one or more other entities.**********

********** That is approximately EUR 60 750 000 at the exchange rate applicable at the time of writing.

********** See footnote 4 above.

********** Recital 2.

********** See also Opinion of Advocate General Jääskinen in *Swm Costruzioni and Mannocchi Luigino*, C-94/12, EU:C:2013:130, point 33.

********** Judgment in *Swm Costruzioni 2 and Mannocchi Luigino*, C-94/12, EU:C:2013:646, paragraph 31. See also the judgments in *Ordine degli Architetti and Others*, C-399/98, EU:C:2001:401, paragraph 90 (interpreting 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 *CoNISMa*, C-305/08, EU:C:2009:807, paragraph 41.

********** Articles 47(2), first sentence, 48(2)(b) and (i) and 48(3), first sentence, of Directive 2004/18.

********** Judgments in *Holst Italia*, C-176/98, EU:C:1999:593, paragraph 26, *Siemens and ARGE Telekom*, C-314/01, EU:C:2004:159, paragraph 43, and *Swm Costruzioni 2 and Mannocchi Luigino*, C-94/12, EU:C:2013:646, paragraph 32.

32. That said, contracting authorities do have a legitimate interest in ensuring that the contract will be effectively and properly carried out. Where an economic operator intends to rely on capacities of other economic operators in a tendering procedure, it must therefore establish that it actually will have at its disposal the resources of those operators which it does not itself own and whose participation is necessary to perform the contract.********** A tenderer claiming to have at its disposal the technical and economic capacities of third parties on which it intends to rely if it obtains the contract may be excluded by the contracting authority only if it fails to meet that requirement.**********

33. The contracting authority may not always be in a position to verify the technical and economic capacities of the subcontractors when examining the tenders and selecting the lowest tenderer. The Court has held that in such cases Directive 2004/18 does not preclude a prohibition or a restriction on subcontracting the performance of essential parts of the contract.********** Such a prohibition or restriction is justified by the contracting authority's legitimate interest in ensuring that the public contract will be effectively and properly carried out. Directive 2004/18 does not require a contracting authority to accept performance of *essential parts* of the public contract by entities whose capacities and qualities it has been unable to assess during the contract award procedure.**********

34. In my view, considering the essential role subcontracting plays in promoting the objectives of Directive 2004/18,********** no other prohibition or restriction is permissible. It is true that, in *Swm Costruzioni 2 and Mannocchi Luigino*, the Court considered that there may be works with special requirements necessitating a certain capacity which cannot be obtained by combining the capacities of more than one operator which individually would be unable to perform that work. In those specific circumstances, the Court has held that the contracting authority is justified in requiring that the minimum capacity level concerned be achieved by a single economic operator or, where appropriate, by relying on a limited number of economic operators, in accordance with the second subparagraph of Article 44(2) of Directive 2004/18, as long as that requirement is related and proportionate to the subject-matter of the contract at issue.********** However, that is not a specific ground for prohibiting or restricting subcontracting as such. Nothing precludes that 'single economic operator' or 'limited number of economic operators' from being a subcontractor or subcontractors of the successful tenderer(s).

35. It follows that a stipulation such as that in issue in the main proceedings is clearly not consistent with Directive 2004/18.

36. First, the 25% requirement formed part of the tender specifications which the City of Wrocław addressed to a limited number of economic operators together with the invitation to tender. It therefore restricted recourse to subcontracting at the level of examination of tenders and selection of the successful tenderer.

37. The City of Wrocław submits that it had a legitimate interest in ensuring that the successful tenderer itself enjoyed the technical capacities and human resources necessary to implement at least part of the public works contract because the Law on public contracts did not enable it to verify the technical capacity and financial situation of subcontractors when comparing tenders. That submission

********** Articles 47(2), second sentence, and 48(3), second sentence, of Directive 2004/18. See also the judgments in *Holst Italia*, C-176/98, EU:C:1999:593, paragraphs 28 and 29, and *Siemens and ARGE Telekom*, C-314/01, EU:C:2004:159, paragraph 44. See also Opinion of Advocate General Wathelet in *Ostas celtnieks*, C-234/14, EU:C:2015:365, point 40.

********** Judgment in *Siemens and ARGE Telekom*, C-314/01, EU:C:2004:159, paragraph 46.

********** Judgment in *Siemens and ARGE Telekom*, C-314/01, EU:C:2004:159, paragraph 45.

********** Opinion of Advocate General Geelhoed in *Siemens and ARGE Telekom*, C-314/01, EU:C:2003:628, point 82.

********** See points 30 and 31 above.

********** Judgment in *Swm Costruzioni 2 and Mannocchi Luigino*, C-94/12, EU:C:2013:646, paragraph 35.

cannot be upheld. If that is an accurate description of Polish law applicable at the relevant time,********** such a rule limited economic operators' ability in practice to rely on the capacities of other entities in procedures for the award of public contracts, which would have been inconsistent with Articles 47(2) and 48(3) of Directive 2004/18.

38. Second, the 25% requirement does not concern performance of well-defined tasks but merely a percentage of the overall contract value. That requirement was therefore not such as to enable the contracting authority to ensure effective and proper performance of the essence of that contract.

39. Although the present proceedings concern Directive 2004/18, it is interesting to observe that the same rationale appears in Article 63(2) of its successor, Directive 2014/24. According to that provision, contracting authorities may require certain critical tasks to be performed directly by the tenderer itself or, where the tender is submitted by a group of economic operators, by a participant in that group. Whilst that provision now expressly allows restrictions on subcontracting during the examination and selection phase, such restrictions are acceptable only in so far as they concern well-defined tasks regarded as 'critical' for implementing the contract.

40. The conclusion which I have drawn is not called into question either by the fact that the 25% requirement applied only to a limited number of economic operators, who had received an invitation to tender in the context of a restricted procedure, or by the circumstance that none of them either contested it or submitted a tender in which subcontracting exceeded the ceiling. Those circumstances do not alter the nature of the restriction in dispute. For the reasons I have explained, that restriction falls foul of Directive 2004/18.

41. It is likewise immaterial that the restriction on subcontracting in issue constitutes a special condition relating to the performance of the contract within the meaning of Article 26 of Directive 2004/18. Contracting authorities may impose such special conditions only if they are compatible with EU law. That is not the case here.

42. Lastly, I do not agree with the City of Wrocław's submission that that interpretation of Directive 2004/18 cannot be relied upon against it because Article 36(5) of the Law on public contracts, in the version applicable at the material time, authorised contracting authorities to decide freely which parts of the public contract could not be subcontracted. The City of Wrocław, as a local authority, is among the organs of the State against which the sufficiently clear, precise and unconditional provisions of a directive have direct effect.********** In any event, it is settled case-law that, when applying domestic law and, in particular, legislative provisions specifically adopted for the purpose of implementing the requirements of a directive, national courts are bound to interpret that law, so far as possible, in the light of the wording and the purpose of the directive in order to achieve the result sought by the latter and thus to comply with the third paragraph of Article 288 TFEU.********** Although applying national law in the main proceedings is a matter for the referring court, it does not seem to me impossible to construe Article 36(5) of the Law on public contracts in conformity with Directive 2004/18, as I have interpreted it above.

43. I therefore conclude that Directive 2004/18 precludes a contracting authority from stipulating in the tender specifications of a public works contract that the successful tenderer is required to perform part of the works covered by that contract, specified in abstract terms as a percentage, using its own resources.

********** The order for reference indicates that the Minister for regional development explained in his decision of 30 September 2013 that the Law on public contracts did not allow economic operators to rely on the experience of third persons to demonstrate that they met the conditions for participating in the tendering procedure.

********** See the judgment in *Costanzo*, 103/88, EU:C:1989:256, paragraphs 31 and 32. See also, by analogy, the judgment in *Portgás*, C-425/12, EU:C:2013:829, paragraph 38.

********** See, inter alia, the judgments in *von Colson and Kamann*, 14/83, EU:C:1984:153, paragraph 26, and *Impact*, C-268/06, EU:C:2008:223, paragraph 98 and the case-law cited.

Question 2: Financial correction under Article 98(2) of Regulation No 1083/2006

44. It is common ground that Regulation No 1083/2006 applies in the main proceedings, which concern a project that benefited from EU financial assistance through the operational programme.

45. By its second question, the referring court wishes to know whether an infringement of EU public procurement rules such as that identified above constitutes an 'irregularity' within the meaning of Article 2(7) of Regulation No 1083/2006, giving rise to an obligation on the part of the Member State concerned to impose a financial correction on the basis of Article 98(2) of that regulation.

46. The definition of 'irregularity' in Article 2(7) of Regulation No 1083/2006 contains three elements: (i) there must be an act or an omission by an economic operator, (ii) which results in an infringement of a provision of EU law and (iii) which has, or would have, the effect of prejudicing the general budget of the European Union by charging an unjustified item of expenditure to the general budget.

47. The first two conditions are clearly fulfilled in the main proceedings. It is common ground that a contracting authority such as the City of Wrocław, notwithstanding its status as a legal person governed by public law, can be regarded as an 'economic operator' within the meaning of Article 2(7) of Regulation No 1083/2006 when it conducts a procedure for the award of a public contract.********** As is clear from the answer that I propose to Question 1, I consider that the second condition is also satisfied here.

48. The difficulty concerns the third requirement.

49. The City of Wrocław submits that, even if the restriction on subcontracting which it imposed was inconsistent with Directive 2004/18, there was no resulting distortion of competition in the main proceedings and therefore no prejudice to the EU general budget within the meaning of Article 2(7) of Regulation No 1083/2006. The 25% requirement appeared in the tender specifications addressed to the five economic operators invited to tender and none of them challenged it. Each of the three operators which submitted a tender proposed using subcontractors for significantly less than 75% of the total value of its bid. The Polish Government and the Commission submit in essence that a financial correction is justified even where there is only a risk of prejudice to the EU general budget.

50. As a preliminary point, I do not agree with the City of Wrocław that the restriction on subcontracting necessarily had no effect on the procedure for the award of the public works contract. In the absence of that restriction, the tenderers would have been able to propose subcontracting more than 75% of the contract.********** As the Polish Government and the Commission rightly point out, that might have resulted in different offers (in terms of, for example, the price or the timeframe for completing the works). Moreover, it appears from the material before the Court that only three out of the five economic operators invited to tender actually submitted a tender. The 25% requirement may, potentially, have influenced the two remaining operators not to tender. A possible loss to the Funds cannot therefore be ruled out.

51. That said, I regard these matters as immaterial in my opinion when addressing the issue whether Article 98(2) of Regulation No 1083/2006 requires a financial correction in a situation such as that in the main proceedings.

********** See, to that effect, the judgment in *Chambre de commerce et d'industrie de l'Indre*, C-465/10, EU:C:2011:867, paragraph 45.

********** The fact that their tenders proposed no more than 32.13% subcontracting is immaterial in this respect.

52. The Court's case-law interpreting the concept of 'irregularity' in Regulation No 2988/95 provides helpful guidance in this context. First, that regulation defines the concept of an 'irregularity' in a way similar to Regulation No 1083/2006.********** Second, Regulation No 2988/95 lays down general principles relating to homogenous checks and to administrative measures and penalties concerning irregularities with regard to EU law, which are to be observed in all areas in which the European Union's financial interests are potentially threatened.**********

53. Thus, *Chambre de commerce et d'industrie de l'Indre*********** concerned recovery of EU subsidies awarded under the Structural Funds as a result of a failure to comply with EU public procurement rules. The Court emphasised in that judgment that the Structural Funds may not be used to finance operations carried out in breach of those rules.********** Consequently, the fact that the recipient of a subsidy from the European Regional Development Fund, in its capacity as contracting authority, had violated procurement rules on public contracts when implementing a subsidised operation involved an unjustified item of expenditure and thus prejudiced the EU budget.********** The Court observed that 'even irregularities having no specific financial impact may be seriously prejudicial to the financial interests of the [European Union]'.**********

54. In my view, the same principles are relevant when interpreting the concept of 'irregularity' in Regulation No 1083/2006.

55. First, both recital 22 and Article 9(2) and (5) of that regulation confirm that the activities of the Funds and the operations which they help to finance should be fully consistent with EU law, including EU public procurement rules. Granting financial assistance to a project which does not comply in all respects with those rules therefore involves charging an (at least partly) unjustified item of expenditure to the EU budget. Second, applying a financial correction in those circumstances is consistent with the principle laid down in Article 2(1) of Regulation No 2988/95 that administrative measures adopted in order to ensure the proper application of EU law should be dissuasive. That is all the more important in a context where it may not prove easy or even possible to demonstrate and quantify the precise prejudice which the irregularity caused to the EU budget. Lastly, the reference to 'financial loss to the Funds' in Article 98(2) of Regulation No 1083/2006 does not call that interpretation into question. Whether actual, quantifiable financial loss has occurred is only one of the factors which the Member States are required to take into account when they impose financial corrections on the basis of that provision.

********** Article 1(2) of Regulation No 2988/95.

********** See, to that effect, the judgments in *Handlbauer*, C-278/02, EU:C:2004:388, paragraph 31, and *Jager*, C-420/06, EU:C:2008:152, paragraph 61 and the case-law cited. The Court has however made clear that, since Regulation No 2988/95 merely lays down general rules, it is on the basis of other provisions, namely, where appropriate, on the basis of sector-specific provisions (such as Article 98(2) of Regulation No 1083/2006), that the recovery of misused funds must be carried out (judgment in *Somvao*, C-599/13, EU:C:2014:2462, paragraph 37 and the case-law cited).

********** C-465/10, EU:C:2011:867.

********** The Court there referred to Article 7(1) of Council Regulation (EEC) No 2052/88 of 24 June 1988 on the tasks of the Structural Funds and their effectiveness and on coordination of their activities between themselves and with the operations of the European Investment Bank and the other existing financial instruments (OJ 1988 L 185, p. 9), as amended by Council Regulation (EEC) No 2081/93 of 20 July 1993 (OJ 1993 L 193, p. 5). Article 7(1) provided that '[m]easures financed by the Structural Funds or receiving assistance from the [European Investment Bank] or from another existing financial instrument shall be in conformity with the provisions of the Treaties, with the instruments adopted pursuant thereto and with Community policies, including those concerning … the award of public contracts …'.

********** Judgment in *Chambre de commerce et d'industrie de l'Indre*, C-465/10, EU:C:2011:867, paragraph 46.

********** Judgment in *Chambre de commerce et d'industrie de l'Indre*, C-465/10, EU:C:2011:867, paragraph 47 and case-law cited. See also my Opinion in *Chambre de commerce et d'industrie de l'Indre*, C-465/10, EU:C:2011:596, points 59 to 65.

56. In my view, an infringement of EU public procurement rules such as that in issue in the main proceedings therefore constitutes an 'irregularity' within the meaning of Article 2(7) of Regulation No 1083/2006 which requires the competent authority in the Member State concerned to impose a financial correction on grounds of Article 98(2) of that regulation even if the infringement did not result in any quantifiable financial loss to the Funds.

57. The City of Wrocław submits that the CUPT violated Article 98(2) of Regulation No 1083/2006 when it calculated the financial correction mechanically on the basis of the 'Taryfikator', thus failing to take into account the negligible gravity of that irregularity and the absence of quantifiable loss to the Funds.

58. Can the competent national authorities apply pre-defined, flat-rate corrections when they identify irregularities in procedures for the award of public contracts?

59. Although the referring court does not expressly seek guidance on how any financial correction applicable should be calculated, the question is one that requires exploration.

60. Article 98(2) of Regulation No 1083/2006 requires a Member State, when calculating a financial correction, to take into account the nature and gravity of the irregularities and the financial loss to the Funds. That provision leaves a wide margin to the Member State subject to compliance with the twin principles of equivalence and effectiveness and with the principle of proportionality. The proportionality requirement results in particular from Article 2(1) of Regulation No 2988/95, which requires administrative checks, measures and penalties to be introduced 'in so far as they are necessary to ensure the proper application of [EU] law' and to be 'effective, proportionate and dissuasive so that they provide adequate protection for the [European Union's] financial interests'.********** Financial corrections should therefore not go beyond what is actually necessary given the nature and gravity of the infringements.**********

61. The Court has made clear moreover in the context of measures aimed at protecting the European Union's financial interests that the Commission may consider using a flat-rate correction where it is not possible to determine precisely the losses suffered by the European Union.********** I consider that the same principle should apply to the Member States when they act on the basis of Article 98 of Regulation No 1083/2006. It follows that the competent national authorities may apply flat-rate corrections when they identify an infringement to EU public procurement rules. This is a situation where it is often difficult if not impossible to determine precisely the ensuing losses for the Funds. The use of flat-rate corrections is likely both to facilitate the task of those authorities and to reinforce legal certainty by making such corrections easier to predict. Flat-rate corrections must of course reflect appropriately the nature and gravity of the various irregularities to which they apply and must not result in disproportionate corrections.********** Circumstances may thus sometimes require adjusting the flat-rate correction applicable for a given irregularity. For example, if the contracting authority was acting in conformity with national rules that were not (fully) consistent with EU law, that would tend to affect the gravity of the irregularity and hence the appropriate level of financial correction.

********** Regulation No 1303/2013 now explicitly requires the Member States to apply financial corrections which are 'proportionate' (see Article 143(2)).

********** See Opinion of Advocate General Jääskinen in *Denmark* v *Commission*, C-417/12 P, EU:C:2014:286, point 76 (concerning financial corrections applied by the Commission).

********** See, in particular, the judgments in *United Kingdom* v *Commission*, C-346/00, EU:C:2003:474, paragraph 53, *Belgium* v *Commission*, C-418/06 P, EU:C:2008:247, paragraph 136, and *Denmark* v *Commission*, C-417/12 P, EU:C:2014:2288, paragraph 105. See also Article 99(2) of Regulation No 1083/2006.

********** See point 60 above.

Temporal effects of the judgment

62. The Polish Government submits that the judgment should produce effects only for the future if the Court concludes that Article 25 of Directive 2004/18 does not preclude a contracting authority from imposing a restriction on subcontracting such as that in issue in the main proceedings. Contracting authorities might otherwise claim reimbursement of financial corrections imposed on them since 2008 on grounds similar to those advanced in these proceedings. Verifying financial corrections imposed on these grounds would involve recalculating the amounts of public spending already notified by the Polish authorities to the Commission. The Polish authorities might then not be able to claim from the Commission the amounts of financial assistance they have advanced.

63. If the Court agrees with the answer which I have suggested to the first question, it is not necessary to address that request. If the Court were to reach the opposite conclusion, however, I see no reason to limit the temporal effects of the judgment.

64. According to settled case-law, the interpretation which, in the exercise of the jurisdiction conferred upon it by Article 267 TFEU, the Court gives to a rule of EU law clarifies and defines where necessary the meaning and scope of that rule as it must be, or ought to have been, understood and applied from the time of its coming into force. As a result, the rule so interpreted may, and must, be applied by the courts even to legal relationships arising and established before the judgment ruling on the request for interpretation, provided that in other respects the conditions enabling an action relating to the application of that rule to be brought before the courts having jurisdiction are satisfied. **********

65. Against that background, the Court only exceptionally grants requests such as that made by the Polish Government. The Court has taken such a step only in certain specific circumstances, where there was a risk of serious economic repercussions owing in particular to the large number of legal relationships entered into in good faith on the basis of the rules considered to be validly in force, and where it appeared that both individuals and national authorities had been led into adopting practices which did not comply with EU law by reason of objective, significant uncertainty regarding the implications of EU provisions, to which the conduct of other Member States or the Commission may have contributed. ********** In contrast, the financial consequences which might ensue for a Member State from a preliminary ruling do not in themselves justify limiting the temporal effect of the ruling. **********

66. In the present case, the Polish Government argues in essence that a judgment interpreting Directive 2004/18 as set out at point 62 above might entail significant financial consequences for it. Considering the principles that I have just recalled, that argument cannot succeed. In any case, the Polish Government has not submitted any material which would enable the Court to consider whether the Republic of Poland actually risks incurring serious economic repercussions. In particular, the Polish Government has not indicated how many financial corrections imposed in that Member State on grounds analogous to those in issue in the main proceedings are liable to be called into question by such judgment. Nor does it provide any information about the total amount of those corrections.

********** See, for example, the judgments in *Roders and Others*, C-367/93 to C-377/93, EU:C:1995:261, paragraph 42 and the case-law cited, and *Richardson*, C-137/94, EU:C:1995:342, paragraph 31.

********** Judgment in *Roders and Others*, C-367/93 to C-377/93, EU:C:1995:261, paragraph 43 and the case-law cited.

********** See, inter alia, the judgments in *Bidar*, C-209/03, EU:C:2005:169, paragraph 68, *Linneweber and Akritidis*, C-453/02 and C-462/02, EU:C:2005:92, paragraph 44, and *Santander Asset Management SGIIC and Others*, C-338/11 to C-347/11, EU:C:2012:286, paragraph 62.

Conclusion

67. In the light of the foregoing considerations, I suggest that the Court should answer the questions referred by the Wojewódzki Sąd Administracyjny w Warszawie (Regional Administrative Court, Warsaw, Poland) as follows:

(1) 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 precludes a contracting authority from stipulating in the tender specifications of a public works contract that the successful tenderer is required to perform part of the works covered by that contract, specified in abstract terms as a percentage, using its own resources.

(2) If a contracting authority disregards that prohibition in the context of a procedure for the award of a public contract benefiting from an operational programme governed by Council Regulation (EC) No 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999, it commits an 'irregularity' within the meaning of Article 2(7) of that regulation. In those circumstances, Article 98(2) of Regulation No 1083/2006 requires the competent national authority to impose a financial correction on that contracting authority, even if the irregularity did not result in any quantifiable loss to the Funds.