Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

26 September 2019*

(Reference for a preliminary ruling — Articles 49 and 56 TFEU — Public procurement — Directive 2014/24/EU — Article 71 — Subcontracting — National legislation limiting the possibility of subcontracting to 30% of the total amount of the contract)

In Case C-63/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunale amministrativo regionale per la Lombardia (Regional Administrative Court, Lombardy, Italy), made by decision of 13 December 2017, received at the Court on 1 February 2018, in the proceedings

Vitali SpA

v

Autostrade per l'Italia SpA,

THE COURT (Fifth Chamber),

composed of E. Regan (Rapporteur), President of the Chamber, C. Lycourgos, E. Juhász, M. Ilešič and I. Jarukaitis, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the Italian Government, by G. Palmieri, acting as Agent, and by C. Colelli and V. Nunziata, avvocati dello Stato,

– the Norwegian Government, by K.H. Aarvik, H. Røstum and C. Anker, acting as Agents,

– the European Commission, by L. Haasbeek, G. Gattinara and P. Ondrůšek, acting as Agents,

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

gives the following

* Language of the case: Italian.

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 49 and 56 TFEU, Article 71 of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65), as amended by Commission Delegated Regulation (EU) 2015/2170 of 24 November 2015 (OJ 2015 L 307, p. 5) ('Directive 2014/24'), and the principle of proportionality.

2 The request has been made in proceedings between Vitali SpA and Autostrade per l'Italia SpA concerning a decision taken by the latter, in its capacity as contracting authority, to exclude the former from a public procurement procedure.

Legal context

EU law

3 Recitals 1, 41, 78, 100 and 105 of Directive 2014/24 state:

'(1) The award of public contracts by or on behalf of Member States' authorities has to comply with the principles of the Treaty on the Functioning of the European Union (TFEU), and in particular the free movement of goods, freedom of establishment and the freedom to provide services, as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency. However, for public contracts above a certain value, provisions should be drawn up coordinating national procurement procedures so as to ensure that those principles are given practical effect and public procurement is opened up to competition.

…

(41) Nothing in this Directive should prevent the imposition or enforcement of measures necessary to protect public policy, public morality [and] public security …, provided that those measures are in conformity with the TFEU.

…

(78) Public procurement should be adapted to the needs of [small and medium-sized enterprises (SMEs)]. Contracting authorities should be encouraged to make use of the Code of Best Practices set out in the Commission Staff Working Document of 25 June 2008 entitled "European Code of Best Practices Facilitating Access by SMEs to Public Procurement Contracts", providing guidance on how they may apply the public procurement framework in a way that facilitates SME participation. To that end and to enhance competition, contracting authorities should in particular be encouraged to divide large contracts into lots. …

Member States should remain free to go further in their efforts to facilitate the involvement of SMEs in the public procurement market, by extending the scope of the obligation to consider the appropriateness of dividing contracts into lots to smaller contracts, by requiring contracting authorities to provide a justification for a decision not to divide contracts into lots or by rendering a division into lots obligatory under certain conditions. With the same purpose, Member States should also be free to provide mechanisms for direct payments to subcontractors.

…

(100) Public contracts should not be awarded to economic operators that have participated in a criminal organisation or have been found guilty of corruption, fraud to the detriment of the Union's financial interests, terrorist offences, money laundering or terrorist financing. …

…

(105) It is important that observance by subcontractors of applicable obligations in the fields of environmental, social and labour law, established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in this Directive, provided that such rules, and their application, comply with Union law, be ensured through appropriate actions by the competent national authorities within the scope of their responsibilities and remit, such as labour inspection agencies or environmental protection agencies.

…

… Furthermore, it should be stated explicitly that Member States should be able to go further, for instance by extending the transparency obligations, by enabling direct payment to subcontractors or by enabling or requiring contracting authorities to verify that subcontractors are not in any of the situations in which exclusion of economic operators would be warranted. …

It should also be set out explicitly that Member States remain free to provide for more stringent liability rules under national law or to go further under national law on direct payments to subcontractors.'

4 In accordance with Article 4(a) of Directive 2014/24, that directive applies, in the case of public works contracts, to procurements with a value net of value added tax (VAT) estimated to be equal to or greater than the threshold of EUR 5 225 000.

5 Article 18 of that directive, headed 'Principles of procurement', provides in the first subparagraph of paragraph 1:

'Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.'

6 Article 57 of that directive, headed 'Exclusion grounds', provides in paragraph 1 that contracting authorities are to exclude an economic operator from participation in a procurement procedure where they have established, by verifying in accordance with Articles 59, 60 and 61, or are otherwise aware that that economic operator has been the subject of a conviction by final judgment for one of the reasons listed in that provision.

7 Article 63 of the directive, headed 'Reliance on the capacities of other entities', provides in the first subparagraph of paragraph 1:

'With regard to criteria relating to economic and financial standing as set out pursuant to Article 58(3), and to criteria relating to technical and professional ability as set out pursuant to Article 58(4), 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. With regard to criteria relating to the educational and professional qualifications as set out in point (f) of Annex XII Part II, or to the relevant professional experience, economic operators may however only rely on the capacities of other entities where the latter will perform the works or services for which these capacities are required. Where an economic operator wants to rely on the capacities of other entities, it shall prove to the contracting authority that it will have at its disposal the resources necessary, for example, by producing a commitment by those entities to that effect.'

8 Article 71 of Directive 2014/24, headed ‘Subcontracting’, provides:

‘1. Observance of the obligations referred to in Article 18(2) by subcontractors is ensured through appropriate action by the competent national authorities acting within the scope of their responsibility and remit.

2. In the procurement documents, the contracting authority may ask or may be required by a Member State to ask the tenderer to indicate in its tender any share of the contract it may intend to subcontract to third parties and any proposed subcontractors.

3. Member States may provide that at the request of the subcontractor and where the nature of the contract so allows, the contracting authority shall transfer due payments directly to the subcontractor for services, supplies or works provided to the economic operator to whom the public contract has been awarded (the main contractor). Such measures may include appropriate mechanisms permitting the main contractor to object to undue payments. The arrangements concerning that mode of payment shall be set out in the procurement documents.

4. Paragraphs 1 to 3 shall be without prejudice to the question of the main contractor’s liability.

5. In the case of works contracts and in respect of services to be provided at a facility under the direct oversight of the contracting authority, after the award of the contract and at the latest when the performance of the contract commences, the contracting authority shall require the main contractor to indicate to the contracting authority the name, contact details and legal representatives of its subcontractors, involved in such works or services, in so far as known at this point in time. The contracting authority shall require the main contractor to notify the contracting authority of any changes to this information during the course of the contract as well as of the required information for any new subcontractors which it subsequently involves in such works or services.

Notwithstanding the first subparagraph, Member States may impose the obligation to deliver the required information directly on the main contractor.

Where necessary for the purposes of point (b) of paragraph 6 of this Article, the required information shall be accompanied by the subcontractors’ self-declarations as provided for in Article 59. The implementing measures pursuant to paragraph 8 of this Article may provide that subcontractors which are presented after the award of the contract shall provide the certificates and other supporting documents instead of the self-declaration.

The first subparagraph shall not apply to suppliers.

Contracting authorities may extend or may be required by Member States to extend the obligations provided for in the first subparagraph to for instance:

(a) supply contracts, to services contracts other than those concerning services to be provided at the facilities under the direct oversight of the contracting authority or to suppliers involved in works or services contracts;

(b) subcontractors of the main contractor’s subcontractors or further down the subcontracting chain.

6. With the aim of avoiding breaches of the obligations referred to in Article 18(2), appropriate measures may be taken, such as:

(a) Where the national law of a Member State provides for a mechanism of joint liability between subcontractors and the main contractor, the Member State concerned shall ensure that the relevant rules are applied in compliance with the conditions set out in Article 18(2).

(b) Contracting authorities may, in accordance with Articles 59, 60 and 61, verify or may be required by Member States to verify whether there are grounds for exclusion of subcontractors pursuant to Article 57. In such cases, the contracting authority shall require that the economic operator replaces a subcontractor in respect of which the verification has shown that there are compulsory grounds for exclusion. The contracting authority may require or may be required by a Member State to require that the economic operator replaces a subcontractor in respect of which the verification has shown that there are non-compulsory grounds for exclusion.

7. Member States may provide for more stringent liability rules under national law or go further under national law on direct payments to subcontractors, for instance by providing for direct payments to subcontractors without it being necessary for them to request such direct payment.

8. Member States having chosen to provide for measures pursuant to paragraphs 3, 5 or 6 shall, by law, regulation or administrative provisions and having regard for Union law, specify the implementing conditions for those measures. In so doing, Member States may limit their applicability, for instance in respect of certain types of contracts, certain categories of contacting authorities or economic operators or as of certain amounts.'

Italian law

9 The third sentence of Article 105(2) of decreto legislativo n. 50 — Codice dei contratti pubblici (Legislative Decree No 50 establishing the public procurement code) of 18 April 2016 (ordinary supplement to GURI No 91 of 19 April 2016, 'Legislative Decree No 50/2016') provides:

'Save as provided for in paragraph 5, any subcontracting shall not exceed 30% of the total amount of the contract for works, services or supplies.'

10 Article 105(5) of Legislative Decree No 50/2016 is worded as follows:

'For works referred to in Article 89(11), and without prejudice to the limits provided for in that paragraph, any subcontracting shall not exceed 30% of the amount of the works and shall not be subdivided without objective reasons.'

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

11 By a public contract notice published in August 2016, Autostrade per l'Italia launched a restricted tendering procedure for the award of works to widen the fifth lane of the Italian A8 motorway between the toll barrier at North Milan (Italy) and the interconnection in Lainate (Italy), for a basic amount of EUR 85 211 216.84, excluding VAT.

12 Vitali was excluded from the tendering procedure on the ground that the 30% limit in respect of subcontracting laid down in Article 105(2) of Legislative Decree No 50/2016 had been exceeded.

13 Vitali brought an action before the referring court seeking, inter alia, its readmission to the tendering procedure.

14 By partial judgment of 5 January 2018, the referring court rejected all the pleas in law advanced by Vitali in support of the action, with the exception of the plea alleging that the 30% limit on subcontracting provided for by Italian law is not in conformity with EU law.

15 The referring court has doubts as to whether such a quantitative limit is compatible with Articles 49 and 56 TFEU, Article 71 of Directive 2014/24 and the principle of proportionality.

16 That court points out that the Consiglio di Stato (Council of State, Italy) has ruled that the national legislature is entitled to fix limits on subcontracting that are more stringent than those provided for in the relevant provisions of EU law, in so far as more stringent limits are justified, first, in the light of the principles of social sustainability and, second, in the light of the values set out in Article 36 TFEU, which include public policy and public security. The referring court also points out that the Consiglio di Stato (Council of State) is of the opinion that the Court's case-law relating to the quantitative limits on subcontracting in the field of public procurement, which concerns 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), does not apply in the context of Directive 2014/24.

17 However, the referring court also observes that, like Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1) and Directive 2004/18, Directive 2014/24 does not impose any quantitative limit on subcontracting. According to the referring court, the setting of a general limit on subcontracting of 30% of the total amount of the contract may make it more difficult for undertakings, particularly small and medium-sized undertakings, to access public contracts, thereby hindering the exercise of freedom of establishment and the freedom to provide services. That limit is set in abstract terms as a certain percentage of the contract, irrespective of the possibility of verifying the capacities of potential subcontractors and without mention of the essential character of the tasks in question.

18 Consequently, the referring court is uncertain as to whether the national legislation at issue goes beyond what is necessary to achieve the objectives pursued.

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

'Do the principles of freedom of establishment and freedom to provide services referred to in Articles 49 and 56 of the [TFEU], Article 71 of [Directive 2014/24], which does not contemplate quantitative limitations on subcontracting, and the EU-law principle of proportionality preclude the application of national legislation in matters relating to public procurement, such as the Italian rule set out in the third sentence of Article 105(2) of [Legislative Decree No 50/2016], pursuant to which subcontracting cannot exceed 30% of the total amount of the contract for works, services or supplies?'

20 The referring court's request that its request for a preliminary ruling be determined pursuant to an expedited procedure in accordance with Article 105(1) of the Rules of Procedure of the Court of Justice was refused by order of the President of the Court of 8 March 2018, *Vitali* (C-63/18, not published, EU:C:2018:199).

Consideration of the question referred

21 By its question, the referring court asks, in essence, whether Articles 49 and 56 TFEU and Directive 2014/24 must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which limits to 30% the share of the contract which the tenderer is permitted to subcontract to third parties.

22 As a preliminary point, it should be noted that since the value, net of VAT, of the contract at issue in the main proceedings is greater than the threshold of EUR 5 225 000 prescribed by Article 4(a) of Directive 2014/24, it is in the light of that directive that the present request for a preliminary ruling must be answered.

23 That directive, as is apparent, in essence, from recital 1, seeks to ensure compliance, in the award of public contracts, with, inter alia, the free movement of goods, freedom of establishment and the freedom to provide services, as well as with the principles deriving therefrom, in particular equal treatment, non-discrimination, proportionality and transparency, and to ensure that public procurement is opened up to competition.

24 In particular, to that end, the directive explicitly contemplates, in Article 63(1), the possibility for tenderers to rely, subject to certain conditions, on the capacities of other entities to meet certain selection criteria for economic operators.

25 In addition, Article 71 of that directive, which deals specifically with subcontracting, provides, in paragraph 2, that the contracting authority may ask, or may be required by a Member State to ask, the tenderer to indicate in its tender any share of the contract it may intend to subcontract to third parties and any proposed subcontractors.

26 It follows that, like Directive 2004/18 that it repealed, Directive 2014/24 provides for the possibility for tenderers to rely on subcontractors for the performance of a contract, provided that the conditions laid down in that directive are met (see, to that effect, in respect of Directive 2004/18, judgment of 14 July 2016, *Wrocław — Miasto na prawach powiatu*, C-406/14, EU:C:2016:562, paragraphs 31 to 33).

27 According to settled case-law, and as recital 78 of Directive 2014/24 makes clear, it is in the interests of the European Union to ensure, in the field of public procurement, that the opening up of competition in tendering procedures is enhanced. The use of subcontractors, which is likely to facilitate access of small and medium-sized undertakings to public contracts, contributes to the pursuit of that objective (see, to that effect, judgment of 5 April 2017, *Borta*, C-298/15, EU:C:2017:266, paragraph 48 and the case-law cited).

28 Furthermore, the Court held in paragraph 35 of its judgment of 14 July 2016, *Wrocław — Miasto na prawach powiatu* (C-406/14, EU:C:2016:562), which concerned the interpretation of Directive 2004/18, that a clause in the tender specifications for a public works contract which imposes limits on the use of subcontractors for a share of the contract fixed in abstract terms as a certain percentage of that contract, irrespective of the possibility of verifying the capacities of potential subcontractors and without any mention of the essential character of the tasks which would be concerned, is incompatible with Directive 2004/18, which was applicable in the context of the proceedings giving rise to that judgment.

29 In that regard it should be noted that, while Article 71 of Directive 2014/24 reproduces, in essence, the wording of Article 25 of Directive 2004/18, it nevertheless prescribes additional rules on subcontracting. In particular, Article 71 provides for the possibility for the contracting authority to ask, or of being required by a Member State to ask, the tenderer to inform it of its intentions as regards subcontracting, and for the possibility, subject to certain conditions, for the contracting authority to transfer due payments directly to the subcontractor for services, supplies or works provided to the main contractor. In addition, Article 71 provides that contracting authorities may verify, or may be required by Member States to verify, whether there are grounds to exclude subcontractors pursuant to Article 57 of that directive due to, inter alia, participation in a criminal organisation, corruption or fraud.

30 However, it cannot be inferred from the intention of the EU legislature to circumscribe more precisely, by means of the adoption of such rules, the situations in which the tenderer uses subcontractors that Member States now have the power to limit that use to a share of the contract fixed in abstract terms as a certain percentage of the contract, as in the case of the limit imposed by the legislation at issue in the main proceedings.

31 In that regard, the Italian Government submits that it is open to Member States to provide for measures other than those specifically listed in Directive 2014/24, in order to ensure, inter alia, observance of the principle of transparency in public procurement procedures, given the greater emphasis placed on that principle in the context of that directive.

32 More specifically, the Italian Government highlights the fact that the limit on the use of subcontracting at issue in the main proceedings is justified in the light of the particular circumstances prevailing in Italy, where subcontracting has always been one of the mechanisms used to carry out criminal operations. By limiting the share of the contract that can be subcontracted, the national legislation makes participation in public purchasing less attractive to criminal organisations, and this is capable of preventing the phenomenon of mafia infiltration in public purchasing and thus protecting public policy.

33 It is true, as the Italian Government points out, that recitals 41 and 105 of Directive 2014/24 and certain provisions thereof, such as Article 71(7), explicitly state that Member States remain free to provide for rules in their national legislation that in some respects are more stringent than those provided for by the directive as regards subcontracting, provided that those rules are compatible with EU law.

34 It is also true, as is apparent from, inter alia, the qualitative selection criteria provided for in Directive 2014/24, in particular the exclusion grounds laid down in Article 57(1), that, by adopting such provisions, the EU legislature intended to prevent economic operators who have been the subject of a conviction by final judgment in the circumstances prescribed in that article from participating in a procurement procedure.

35 Similarly, recital 41 of Directive 2014/24 states that nothing in that directive should prevent the imposition or enforcement of measures necessary, inter alia, to protect public policy, public morality and public security, provided that those measures are in conformity with the TFEU, while recital 100 of that directive states that public contracts should not be awarded, inter alia, to economic operators who have participated in a criminal organisation.

36 In addition, according to settled case-law, Member States must be recognised as having a certain discretion for the purpose of adopting measures intended to ensure observance of the principle of transparency, which is binding on contracting authorities in any procedure for the award of a public contract. 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 that principle (see, to that effect, judgment of 22 October 2015, *Impresa Edilux and SICEF*, C-425/14, EU:C:2015:721, paragraph 26 and the case-law cited).

37 More specifically, the Court has already held that combating the phenomenon of infiltration of the public procurement sector by organised crime constitutes a legitimate objective capable of justifying a restriction on the fundamental rules and general principles of the TFEU which apply in public procurement procedures (see, to that effect, judgment of 22 October 2015, *Impresa Edilux and SICEF*, C-425/14, EU:C:2015:721, paragraphs 27 and 28).

38 However, even if a quantitative limit on the use of subcontracting may be regarded as likely to combat such a phenomenon, a restriction such as that at issue in the main proceedings goes beyond what is necessary to achieve that objective.

39 In that regard, it should be borne in mind that the contracting authorities must, throughout the procedure, observe the principles of procurement set out in Article 18 of Directive 2014/24, which include, inter alia, the principles of equal treatment, transparency and proportionality (judgment of 20 September 2018, *Montte*, C-546/16, EU:C:2018:752, paragraph 38).

40 In particular, as pointed out in paragraph 30 of the present judgment, the national legislation at issue in the main proceedings prohibits, in general and abstract terms, use of subcontracting which exceeds a fixed percentage of the public contract concerned, so that that prohibition applies whatever the economic sector concerned by the contract at issue, the nature of the works or the identity of the subcontractors. Furthermore, such a general prohibition does not allow for any assessment on a case-by-case basis by the contracting entity (see, by analogy, judgment of 5 April 2017, *Borta*, C-298/15, EU:C:2017:266, paragraphs 54 and 55).

41 It follows that, in the context of national legislation such as that at issue in the main proceedings, in respect of all contracts, a significant part of the works, supplies or services concerned must be performed by the tenderer itself, failing which it will be automatically excluded from the procurement procedure, including where the contracting entity would be able to verify the identity of the subcontractors concerned and would take the view, after verification, that such a prohibition is not necessary in order to combat organised crime in the context of the contract in question.

42 As the Commission points out, the objective pursued by the Italian legislature could be achieved by less restrictive measures, as in the case of those provided for in Article 71 of Directive 2014/24 and referred to in paragraph 29 of the present judgment. In fact, as the referring court states, Italian law already provides for numerous measures explicitly intended to prohibit undertakings suspected of belonging to the mafia, or in any event of being linked to the interests of the main criminal organisations operating in the country, from having access to public tendering procedures.

43 Accordingly, a restriction on the use of subcontracting such as that at issue in the main proceedings cannot be regarded as compatible with Directive 2014/24.

44 That conclusion cannot be called into question by the argument put forward by the Italian Government that the checks which the contracting authority is required to carry out under national law are ineffective. That fact, which, as seems clear from the Italian Government's own observations, results from the specific manner in which those checks are carried out, does not in any way alter the restrictive nature of the national measure at issue in the main proceedings. Moreover, in the present case the Italian Government has not in any way demonstrated that the various rules provided for in Article 71 of Directive 2014/24, by which Member States may limit the use of subcontracting, and the grounds for excluding subcontractors made possible under Article 57 of that directive, which are referred to in Article 71(6)(b), cannot be implemented in such a way as to achieve the objective pursued by the national legislation at issue in the main proceedings.

45 In the light of the foregoing considerations, the answer to the question referred for a preliminary ruling is that Directive 2014/24 must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which limits to 30% the share of the contract which the tenderer is permitted to subcontract to third parties.

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 (Fifth Chamber) hereby rules:

Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, as amended by Commission Delegated Regulation (EU) 2015/2170 of 24 November 2015, must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which limits to 30% the share of the contract which the tenderer is permitted to subcontract to third parties.

[Signatures]