Reports of Cases

JUDGMENT OF THE COURT (Eighth Chamber)

26 September 2024*

(References for a preliminary ruling – Public procurement – Directive 2004/18/EC – Article 47(3) – Article 48(4) – Exclusion of a tenderer from the tender procedure – Exclusion of the possibility to reduce the initial membership of a temporary group of undertakings which has submitted a tender – Not compatible – Period of validity of a tender – Tender does not lapse at the end of its term – Obligation under the case-law to expressly withdraw that tender – Loss of the provisional security accompanying that tender – Automatic application of that measure – Article 2 – Principles relating to public procurement – Principle of proportionality – Principle of equal treatment – Obligation of transparency – Infringement)

In Joined Cases C-403/23 and C-404/23,

TWO REQUESTS for a preliminary ruling under Article 267 TFEU from the Consiglio di Stato (Council of State, Italy), made by decisions of 16 June 2023, received at the Court on 30 June 2023 and 3 July 2023, in the proceedings

Luxone Srl, acting on its own behalf and as agent of the temporary group of undertakings to be formed with Iren Smart Solutions SpA (C-403/23),

Sofein SpA, formerly Gi One SpA (C-404/23)

v

Consip SpA,

interveners:

Elba Compagnia di Assicurazioni e Riassicurazioni SpA,

Sofein SpA, formerly Gi One SpA (C-403/23),

Iren Smart Solutions SpA,

Consorzio Stabile Energie Locali Scarl,

City Green Light Srl,

Enel Sole Srl,

* Language of the case: Italian.

Luxone Srl (C-404/23),

THE COURT (Eighth Chamber),

composed of N. Piçarra, President of the Chamber, N. Jääskinen and M. Gavalec (Rapporteur), Judges,

Advocate General: P. Pikamäe,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Luxone Srl, acting on its own behalf and as agent of the temporary group of undertakings to be formed with Iren Smart Solutions SpA, and Sofein SpA, by P. Leozappa, avvocato,

– the Italian Government, by G. Palmieri, acting as Agent, and by A. De Curtis, L. Fiandaca and D.G. Pintus, avvocati dello Stato,

– the European Commission, by G. Gattinara and G. Wils, acting as Agents,

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

gives the following

Judgment

1 These requests for a preliminary ruling concern the interpretation 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 corrigendum OJ 2004 L 351, p. 44), Article 6 TEU, Articles 49, 50, 54 and 56 TFEU, Articles 16, 49, 50 and 52 of the Charter of Fundamental Rights of the European Union ('the Charter'), and Article 4 of Protocol No 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Strasbourg on 22 November 1984.

2 The requests have been made in two sets of proceedings between, respectively, Luxone Srl, in its own name and as agent of the temporary group of undertakings to be formed with Iren Smart Solutions SpA, in Case C-403/23, and Sofein SpA, formerly Gi One SpA, in Case C-404/23, on the one hand, and the same contracting authority, Consip SpA, on the other, concerning decisions by which Consip SpA (i) excluded the temporary group of undertakings, of which Luxone and Sofein formed part, from a public procurement procedure and (ii) enforced the provisional security provided by the members of the group for their participation in that procedure.

Legal context

European Union law

Directive 2004/18

3 Recitals 2 and 32 of Directive 2004/18 stated:

‘(2) 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.

…

(32) In order to encourage the involvement of small and medium-sized [enterprises (SMEs)] in the public contracts procurement market, it is advisable to include provisions on subcontracting.’

4 Article 2 of that directive, entitled ‘Principles of awarding contracts’, provided:

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

5 Article 4 of that directive, entitled ‘Economic operators’, provided, in paragraph 2 thereof:

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

6 Article 45 of that directive, entitled ‘Personal situation of the candidate or tenderer’, provided, in paragraph 2 thereof:

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

…

(c) has been convicted by a judgment which has the force of *res judicata* in accordance with the legal provisions of the country of any offence concerning his professional conduct;

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

…

(g) is guilty of serious misrepresentation in supplying the information required under this Section or has not supplied such information.

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

7 Article 47 of Directive 2004/18, entitled 'Economic and financial standing', provided, in paragraphs 2 and 3 thereof:

'2. 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. It must in that case prove to the contracting authority that it will have at its disposal the resources necessary, for example, by producing an undertaking by those entities to that effect.

3. Under the same conditions, a group of economic operators as referred to in Article 4 may rely on the capacities of participants in the group or of other entities.'

8 Article 48 of that directive, entitled 'Technical and/or professional ability', provided:

'1. The technical and/or professional abilities of the economic operators shall be assessed and examined in accordance with paragraphs 2 and 3.

…

3. 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. It must in that case 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 to place the necessary resources at the disposal of the economic operator.

4. Under the same conditions a group of economic operators as referred to [in] Article 4 may rely on the abilities of participants in the group or in other entities.'

9 Entitled 'Information which must be included in public contract notices', Annex VII A to that directive provided, in points 14 and 21 of the section dealing with 'Contract notices', that a contract notice had to state, respectively, 'where appropriate, [the] deposit and guarantees required', and the 'time frame during which the tenderer must maintain its tender (open procedures)'.

Directive 2004/17

10 It follows from Articles 3 to 9 of 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) that that directive applied to public contracts which relate to one or more activities in the following fields: gas, heat and electricity; water; transport services; postal services; exploration for, or extraction of, oil, gas, coal or other solid fuels.

11 Article 11(2) of Directive 2004/17 was worded in the same terms as Article 4(2) of Directive 2004/18, except that the expression 'contracting authorities' was replaced by a reference to 'contracting entities'.

Italian law

12 Decreto legislativo n. 163 – Codice dei contratti pubblici relativi a lavori, servizi e forniture in attuazione delle direttive 2004/17/CE e 2004/18/CE (Legislative Decree No 163 adopting the Code on public works contracts, public service contracts and public supply contracts and transposing Directives 2004/17/EC and 2004/18/EC) of 12 April 2006 (GURI No 100 of 2 May 2006, Ordinary Supplement No 107) ('the previous Public Procurement Code') contained Article 11, entitled 'Stages of the public procurement process', which provided, in paragraph 6 thereof:

'No tenderer may submit more than one tender. The tender shall be binding on the tenderer for the period specified in the notice or invitation to tender or, if no period is specified, for 180 days from the expiry of the deadline for submission of the tender. The contracting entity may ask the tenderers to extend that period.'

13 Article 37 of the previous Public Procurement Code, entitled 'Temporary groups and ordinary consortia of tenderers', provided, in paragraphs 8 to 10, 18 and 19 thereof:

'8. The persons referred to in Article 34(1)(d) and (e) may submit a tender, even if they have not yet been formed. In such cases, the tender must be signed by all the economic operators making up the temporary groups or ordinary consortia of tenderers and those operators shall undertake, if the contract is awarded, to grant a special collective power of attorney to one of the tenderers, identified in the tender as the agent, who will enter into the contract in its name and on its behalf, as well as on behalf of the principals.

9. … Without prejudice to paragraphs 18 and 19, it shall be prohibited to make any change to the composition of temporary groups and ordinary consortia of tenderers compared with the composition submitted in the tender.

10. Failure to comply with the prohibitions laid down in the preceding paragraph shall entail the annulment of the award or the nullity of the contract and the exclusion of groups or ordinary consortia of tenderers at the same time as or subsequent to the award of the same tender.

…

18. In the event of the bankruptcy of the agent or, in the case of an individual contractor, in the event of death, disqualification, incapacity or bankruptcy, or in the cases provided for by the

anti-mafia regulations, the contracting authority may continue the procurement relationship with another economic operator that has been appointed as agent in accordance with the procedure laid down in this Code, provided that it meets the qualification requirements for the provision of the outstanding works or services or supplies; if those requirements are not met, the contracting authority may terminate the contract.

19. In the event of the bankruptcy of one of the principals or, in the case of an individual contractor, in the event of death, prohibition, disqualification or bankruptcy, or in the cases provided for by the anti-mafia regulations, the agent shall, if he or she does not identify another economic operator that fulfils the suitability requirements to take over, be required to perform the contract, directly or through the other principals, provided that the other principals meet the qualification requirements for the provision of the outstanding works or services or supplies.'

14 Article 38 of that code, entitled 'General requirements', contained paragraph 1(f), worded as follows:

'The following persons shall be excluded from participation in procedures for the award of concessions and public works contracts, supply contracts and service contracts and may not be awarded subcontracts or conclude any related contract:

…

(f) any person who, in the reasoned assessment of the contracting authority, has been guilty of serious negligence or bad faith in the performance of any contract awarded to that person by the contracting authority which published the contract notice or any person who has been found guilty of grave professional misconduct proven by any means which the contracting authority can demonstrate;'

15 Article 48 of that code, entitled 'Verification of compliance with the requirements', provided, in paragraph 1 thereof:

'Before opening the tenders submitted, the contracting authorities shall ask a number of tenderers not less than 10% of the tenders submitted, rounded up to the next unit, chosen by the public drawing of lots, to provide proof, within 10 days of the date of that request, that they meet the conditions as to economic and financial standing and technical and organisational capacity, which may be required in the contract notice, by submitting the documentation indicated in that notice or in the letter of invitation. The contracting authorities shall verify, during the review, that the tenderers satisfy the qualification requirement for the execution of works by means of the electronic register referred to in Article 7(10) or by means of the website of the Ministry of Infrastructure and Transport in the case of contracts awarded to general contractors; in the case of suppliers and service providers, the verification of compliance with the requirement referred to in Article 42(1)(a) of this Code shall be carried out by means of the national public procurement database referred to in Article 6bis of this Code. If such proof is not provided, or if it does not confirm the statements contained in the request to participate or in the tender, the contracting authorities shall exclude the tenderer from the invitation to tender, enforce the provisional security relating thereto and report that fact to the authority responsible for the measures referred to in Article 6(11). The authority shall also suspend [the right to participate] in tendering procedures for one to twelve months.'

16 Under Article 75 of that code, entitled 'Securities accompanying the tender':

'1. The tender shall be accompanied by a security, equal to two per cent of the basic price specified in the notice or invitation to tender, in the form of a deposit or guarantee, chosen by the tenderer. …

…

6. The security shall cover the failure to sign the contract owing to the contractor, and shall be automatically released upon signing the contract.

…

9. The contracting authority, when notifying unsuccessful tenderers of the award of the contract, shall at the same time release the security referred to in paragraph 1 to them without delay and in any event within a period not exceeding 30 days from the date of the award of the contract, even if the security is still valid.'

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

17 By a notice published on 21 December 2015, Consip launched an open call for tenders for the award of a contract divided into 12 lots for the provision of lighting services together with related and optional services.

18 A temporary group of undertakings (TGU) to be formed, of which Luxone was the lead undertaking ('the Luxone TGU'), submitted a tender for 4 of those 12 lots. That group also included Consorzio Stabile Energie Locali Scarl ('CSEL'), Iren Servizi e Innovazione SpA (now Iren Smart Solutions), Gestione Integrata Srl and Exitone SpA.

19 By letter of 28 September 2018, Gi One, now Sofein, requested Consip to take note of the fact that it succeeded Exitone and Gestione Integrata 'in all their rights and obligations'.

20 Although Consip reserved the right, when the procedure for the review of irregularities in the tendering procedure was initiated, to verify whether Exitone had continuously complied with the general requirements laid down in Article 38 of the previous Public Procurement Code, it did not initiate any subsequent procedure.

21 The tendering procedure at issue in the main proceedings, which was due to be completed by 18 April 2017 at the latest, was extended eight times 'in order to ensure that Consip had the time necessary to complete the procedure'. Each of those extensions required the confirmation of the tenders that had expired in the meantime and the extension of the provisional securities accompanying those tenders.

22 Following the seventh request for confirmation of those tenders on 2 March 2020, the members of the Luxone TGU informed Consip, by letter of 30 March 2020, that Luxone and Iren Smart Solutions wished to confirm their earlier tenders, but that Sofein and CSEL did not. In essence, Sofein and CSEL stated that, having regard to the length of time taken to prepare the award of

the contract at issue in the main proceedings, the tenders submitted in the course of 2016 '[would] no longer [be] viable from a commercial point of view or from the point of view of sound and prudent business management'.

23 By letter of 9 June 2020, Consip requested all the members of the Luxone TGU to confirm the expired tender for the eighth time and to extend the validity of the related provisional security until 30 November 2020.

24 By letter of 18 June 2020, to which Consip did not respond, Luxone and Iren Smart Solutions repeated their tenders and reiterated that Sofein and CSEL did not wish to confirm their tenders.

25 By letter of 30 September 2020, Consip initiated a procedure in order to establish whether the requirement laid down in Article 38(1)(f) of the previous Public Procurement Code had been complied with and to assess whether the withdrawal of Sofein and CSEL was lawful. Consip argued that, since they failed to confirm their tenders, those two companies had unlawfully 'withdrawn' from the Luxone TGU.

26 By decision of 11 November 2020 ('the exclusion decision of 11 November 2020'), Consip excluded the Luxone TGU from the tendering procedure at issue in the main proceedings.

27 In the first place, Consip claimed that Article 11(6) of the previous Public Procurement Code granted the tenderer alone, that is to say, in the present case, the Luxone TGU as a whole, the right to free itself from the tender after a certain period had elapsed. Consequently, that right cannot be exercised by only some of the members of that group.

28 In the second place, Consip complained, more specifically, that Sofein had withdrawn from that group in order to circumvent Article 38(1) of that code. Under that provision, Sofein should have been excluded from the tendering procedure at issue in the main proceedings on account of the conduct of the two companies it had succeeded, which could have affected its reliability and for which it was responsible. Consip also accused Sofein of criminal conduct.

29 In the third place, Consip alleged 'poor professional conduct' on the part of Luxone, as evidenced by the indictment for obstruction of the public tendering procedures and the judgment delivered on 14 July 2020 by the Tribunale di Messina (District Court, Messina, Italy) against the chairman, until 22 July 2019, of Luxone's predecessor.

30 In the fourth place, Consip complained that CSEL withdrew from the Luxone TGU essentially in order to conceal the fact that that company did not meet the requirements laid down and that it did not have the necessary resources to perform the contract at issue in the main proceedings.

31 By decision of 12 November 2020, Consip ordered the forfeiture of the provisional securities, totalling EUR 2 950 000, which had been provided for the four lots for which the Luxone TGU had submitted a tender.

32 In response to Consip's decisions of 11 and 12 November 2020, CSEL claimed, by letter of 20 November 2020, that it had continuously met all the requirements laid down for participation in the procedure at issue in the main proceedings. Moreover, CSEL's failure to confirm the tender, which could not be classified as a withdrawal from the Luxone TGU, was in the context of an overall reorganisation of the company.

33 By letter of 10 December 2020, Consip confirmed the exclusion decision of 11 November 2020.

34 Luxone, acting on its own behalf and as agent of the Luxone TGU, and Sofein, in two separate actions, unsuccessfully challenged the exclusion decision of 11 November 2020 and the decision of 12 November 2020 before the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio, Italy). For that reason, they appealed against the judgments of that court before the Consiglio di Stato (Council of State, Italy), which is the referring court.

35 The Consiglio di Stato (Council of State) states that it ordered the suspension of the operation of the provisional securities, due in particular to the significant sum at stake.

36 That court considers it appropriate, even before examining the actions in so far as they are directed against the exclusion decision of 11 November 2020, to assess the compatibility with EU law of Article 11(6) of the previous Public Procurement Code which is interpreted by the Italian administrative courts as meaning that the failure to confirm a tender, or only partial confirmation of a tender, at the time when that tender expires and ceases to be binding on the tenderer concerned, is treated in the same way as a withdrawal from the temporary group of undertakings which submitted it.

37 In the case of withdrawal by some of the members of such a group, that court holds that Articles 11(6), 37(8) to (10), (18) and (19), and 38(1)(f) of that code required the contracting authority to exclude the operators belonging to that group in view of the prohibition on changing its composition. The only exceptions to the principle that a temporary group of undertakings is unalterable were set out in Article 37(18) and (19) of that code.

38 The purpose of the rule in Article 11(6) of the previous Public Procurement Code was to ensure that the tender submitted was maintained throughout the foreseeable period of the public procurement procedure and not to limit its effect in time. In the view of the Consiglio di Stato (Council of State), that provision did not mean that that tender automatically lapsed once the period had elapsed, but only that the tenderer concerned could free itself from the tender, subject to expressly availing itself of that option. Furthermore, the principle that a temporary group of undertakings is subjectively unalterable applied even in cases where that group had not yet been formally established.

39 Moreover, in the present case, the exclusion of the Luxone TGU from the tendering procedure at issue in the main proceedings is also justified by the conduct of Sofein, which attempted, by withdrawing from that group, to avoid the planned review of its ‘moral reliability’. It is clear from the case-law of the Consiglio di Stato (Council of State) that the withdrawal of one of the members of a group must be dictated by organisational requirements specific to the temporary group of undertakings or to the consortium.

40 The referring court considers that the contested provisions of the previous Public Procurement Code are compatible with Article 4(2) of Directive 2004/18, and with Article 11(2) of Directive 2004/17, which is worded similarly.

41 Luxone and Sofein, however, criticise the case-law of the Consiglio di Stato (Council of State) in that, in practice, it requires the members of a temporary group of undertakings to remain bound by their tender for an indefinite period, even when that binding tender has expired several times. Such an interpretation runs counter to the principle of freedom to conduct a business guaranteed

in Article 16 of the Charter, the principles of proportionality and competition, as well as the freedom of establishment and the freedom to provide services enshrined in Articles 49, 50, 54 and 56 TFEU.

42 The referring court recognises that, particularly in the case of lengthy procedures, a prohibition which prevents a member of such a group from freeing itself from a tender after the expiry of the extended deadline, under penalty of the entire group being excluded, appears disproportionate as a means of ensuring that that tender is genuine, not least where the economic operators which have confirmed that tender are themselves still capable of satisfying all the requirements for participation in the procurement procedure. In accordance with Article 2 of Directive 2004/18, read in conjunction with recital 2 thereof, the measures adopted by the Member States must not go beyond what is necessary to achieve that objective.

43 Moreover, Luxone and Sofein submit that the unlawfulness of the decision of 12 November 2020 enforcing the provisional securities stems from that of the exclusion decision of 11 November 2020 and from defects specific to that decision. Those securities can be enforced only in the two situations provided for in Article 48(1) and Article 75(6) of the previous Public Procurement Code respectively, namely where the tenderer being verified did not prove that it met 'the conditions as to economic and financial standing and technical and organisational capacity' and where a contract was not signed 'owing to the contractor'. However, the disputes in the main proceedings do not fall within either of those two situations.

44 Although the Corte costituzionale (Constitutional Court, Italy) held, in judgment No 198 of 26 July 2022, that the enforcement of a security did not have the nature of a criminal penalty, the referring court considers, like Luxone and Sofein, that, in view of the magnitude of the 'economic burden' imposed on those companies, the automatic enforcement of the provisional securities would have the characteristics of such a penalty in relation to those companies.

45 In that regard, Article 49(3) of the Charter states that 'the severity of penalties must not be disproportionate to the criminal offence'. Similarly, Article 1 of Protocol No 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Paris on 20 March 1952, and Article 17 of the Charter were interpreted as seeking to ensure respect for proportionality between the conduct engaged in and the penalty imposed, by prohibiting the right to property from being restricted without reason and, therefore, by avoiding an 'excessive and disproportionate burden' in relation to the objective pursued. The principle of proportionality is also expressed in general terms in recital 2 of Directive 2004/18.

46 In those circumstances, the Consiglio di Stato (Council of State) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Do Directive [2004/18], Articles 16 and 52 of the [Charter] and the principles of proportionality, competition, freedom of establishment and freedom to provide services laid down in Articles 49, 50, 54 and 56 … TFEU preclude national rules (Articles 11(6), 37(8), (9), (10), (18) and (19), and 38(1)(f) of [the previous Public Procurement Code]) which exclude, in the event of the expiry of the validity period of the tender originally submitted by a [temporary group of undertakings] to be established, the possibility of reducing the original membership of the [temporary group of undertakings] when the validity period of that tender is extended? In particular, are those national provisions compatible with the general principles of EU law of freedom of economic initiative and effectiveness, and with Article 16 of the [Charter]?

(2) Do Directive [2004/18], Articles 16, 49, 50 and 52 of the [Charter], Article 4 of Protocol No 7 to the European Convention on Human Rights (ECHR), Article 6 TEU, and the principles of proportionality, competition, freedom of establishment and freedom to provide services laid down in Articles 49, 50, 54 and 56 TFEU preclude national rules (Articles 38(1)(f), 48 and 75 of [the previous Public Procurement Code]) which provide for the application of the penalty of forfeiture of the provisional security, as an automatic consequence of the exclusion of an economic operator from a procedure for the award of a public service contract, irrespective of whether or not that economic operator has been awarded the contract?'

Consideration of the questions referred

The first question

47 As a preliminary point, it should be recalled that, according to the Court's settled case-law, in the procedure provided for in Article 267 TFEU, which provides for cooperation between national courts and the Court, it is for the latter to provide the referring court with an answer which will be of use to it and enable it to decide the case before it. To that end, the Court may find it necessary to take account of provisions of EU law to which the national court has not referred in its questions. The fact that a national court has, formally speaking, worded a question referred for a preliminary ruling with reference to certain provisions of EU law does not prevent the Court from providing the national court with all the points of interpretation which may be of assistance in adjudicating on the case pending before it, whether or not that court has referred to them in its questions. In that regard, it is for the Court to extract from all the information provided by the national court, in particular from the grounds of the decision referring the questions, the points of EU law which require interpretation, having regard to the subject matter of the dispute (see, to that effect, judgments of 12 December 1990, *SARPP*, C-241/89, EU:C:1990:459, paragraph 8 and of 5 December 2023, *Nordic Info*, C-128/22, EU:C:2023:951, paragraph 99 and the case-law cited).

48 In the present case, the tendering procedure at issue in the main proceedings does not relate to one or more of the activities referred to in Articles 3 to 9 of Directive 2004/17 to which the directive applies. It must therefore be held that that procedure falls within the scope of Directive 2004/18.

49 In those circumstances, it must be held that, by its first question, the referring court asks, in essence, whether Article 47(3) and Article 48(4) of Directive 2004/18, read in conjunction with the general principle of proportionality, must be interpreted as precluding national legislation which excludes the possibility for original members of a temporary group of tendering undertakings to withdraw from that group where the period of validity of the tender submitted by that group elapses and the contracting authority seeks to extend the validity of the tenders submitted to it.

50 At the outset, it should be recalled that Article 47(2) and Article 48(3) of Directive 2004/18 give an economic operator the right to rely on the economic and financial standing of the participants in the group or of other entities, as well as their technical and/or professional abilities, provided that it proves to the contracting authority that the group will have at its disposal the necessary resources to perform the contract. That directive thus permits the combining of the capacities of more than one economic operator for the purpose of satisfying the minimum capacity requirements set by the contracting authority, provided that the candidate or tenderer relying on the capacities of one or more other entities proves to that authority that it will actually have at its

disposal the resources of those entities necessary for the execution of the contract. Such an interpretation is consistent with the objective pursued by the directives in this area of attaining the widest possible opening-up of public contracts to competition to the benefit of not only economic operators, but also contracting authorities. That interpretation also facilitates the involvement of small- and medium-sized undertakings in public contracts, an aim also pursued by Directive 2004/18, as stated in recital 32 thereof (see, to that effect, judgments of 10 October 2013, *Swm Costruzioni 2 and Mannocchi Luigino*, C-94/12, EU:C:2013:646, paragraphs 29, 33 and 34, and of 2 June 2016, *Pizzo*, C-27/15, EU:C:2016:404, paragraphs 25 to 27).

51 It is also apparent from Article 47(3) and Article 48(4) of that directive that a group of economic operators as referred to in Article 4 of that directive may, under the same conditions, rely on the capacities of participants in the group or of other entities.

52 That said, neither Article 47(3) nor Article 48(4) of Directive 2004/18 lay down specific rules concerning alterations to the composition of a group of tendering economic operators, with the result that the regulation of such a situation falls within the competence of the Member States (see, by analogy, judgment of 24 May 2016, *MT Højgaard and Züblin*, C-396/14, EU:C:2016:347, paragraph 35).

53 In the present case, it follows from Article 37(9), (10), (18) and (19) of the previous Public Procurement Code that, except in the event of bankruptcy of the lead undertaking or a member of a temporary group of undertakings, any alteration affecting the original composition of such a group was prohibited, otherwise all the members of that group would be excluded from the public procurement procedure.

54 That prohibition on altering the composition of a temporary grouping of undertakings must, however, be assessed in the light of the general principles of EU law, in particular the principle of equal treatment, the obligation of transparency which flows from that principle and the principle of proportionality (see, to that effect, judgment of 24 May 2016, *MT Højgaard and Züblin*, C-396/14, EU:C:2016:347, paragraph 36).

55 The principle of proportionality, which is recalled in recital 2 of Directive 2004/18, requires that the rules laid down by the Member States or the contracting authorities in implementing the provisions of that directive must not go beyond what is necessary to achieve the objectives of that directive (see, to that effect, judgments of 16 December 2008, *Michaniki*, C-213/07, EU:C:2008:731, paragraph 48, and of 7 September 2021, *Klaipėdos regiono atliekų tvarkymo centras*, C-927/19, EU:C:2021:700, paragraph 155).

56 The principle of equal treatment affords tenderers equality of opportunity when formulating their tenders, which implies that all tenders must be subject to the same conditions. The obligation of transparency, which is its corollary, is intended to preclude any risk of favouritism or arbitrariness on the part of the contracting authority. That obligation implies 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, secondly, the contracting authority is able to ascertain whether the tenders submitted fulfil the criteria applying to the contract in question (see, to that effect, judgments of 6 November 2014, *Cartiera dell'Adda*, C-42/13, EU:C:2014:2345, paragraph 44, and of 2 June 2016, *Pizzo*, C-27/15, EU:C:2016:404, paragraph 36).

57 The principles of transparency and equal treatment which govern all procedures for the award of public contracts require the substantive and procedural conditions concerning participation in a contract to be clearly defined in advance and made public, in particular the obligations of tenderers, in order that those tenderers may know exactly the procedural requirements and be sure that the same requirements apply to all candidates (see, to that effect, judgments of 9 February 2006, *La Cascina and Others*, C-226/04 and C-228/04, EU:C:2006:94, paragraph 32, and of 2 June 2016, *Pizzo*, C-27/15, EU:C:2016:404, paragraph 37).

58 In that regard, point 21 of Annex VII A to Directive 2004/18 provides that the 'time frame during which the tenderer must maintain its tender (open procedures)' forms an integral part of the information which must be included in the contract notices.

59 In the first place, it follows from the judgment of 24 May 2016, *MT Højgaard and Züblin* (C-396/14, EU:C:2016:347, paragraphs 44 and 48) that Article 47(3) and Article 48(4) of Directive 2004/18 must be interpreted as meaning that members of a temporary group of undertakings may, without infringing the principle of equal treatment, withdraw from that group, provided that it is established, first, that the remaining members of that group meet the conditions for participation in the public procurement procedure provided for by the contracting entity and, secondly, that the continuation of its participation in that procedure does not mean that other tenderers are placed at a competitive disadvantage.

60 Therefore, by imposing a strict requirement to maintain the legal and substantive identity of a temporary group of undertakings, Article 37(9), (10), (18) and (19) of the previous Public Procurement Code manifestly infringes the principle of proportionality.

61 That is all the more so since no derogation is provided for where the contracting authority repeatedly requests the postponement of the date of validity of the tenders. Such a postponement requires all the members of a temporary group of undertakings, first, to immobilise certain resources, both in staff and in equipment, with a view to the possible award of the contract at issue and, secondly, to extend the provisional security provided, which may represent a significant burden, especially for an SME.

62 In the second place, it is apparent from the request for a preliminary ruling that the referring court interpreted Article 11(6) of the previous Public Procurement Code as meaning that the tender did not automatically lapse once the period indicated in the tender had elapsed. Therefore, the tenderer had to expressly avail itself of the right to free itself from the tender. It is also apparent from the request for a preliminary ruling that the specification that the withdrawal of a member of a temporary group of undertakings had to be dictated by organisational needs specific to that group results solely from the case-law of the referring court.

63 The Court has held, on several occasions, that a situation in which the conditions for participating in a procedure for the award of a public contract resulting from the judicial interpretation of national law is particularly disadvantageous for tenderers established in other Member States, inasmuch as their level of knowledge of that national law and the interpretation thereof cannot be compared to that of tenderers from the Member State concerned (judgment of 2 June 2016, *Pizzo*, C-27/15, EU:C:2016:404, paragraph 46, and order of 13 July 2017, *Saferoad Grawil and Saferoad Kabex*, C-35/17, EU:C:2017:557, paragraph 22).

64 Lastly, in so far as the two companies which refused to renew their tender were also criticised for having sought to circumvent the review of compliance with the selection criteria and, therefore, to avoid exclusion from the tendering procedure at issue in the main proceedings, it should be added that, although the contracting authority may, at any time, verify the reliability of the members of a temporary group of undertakings and, on that basis, satisfy itself that those members are not covered by one of the grounds for exclusion from a tendering procedure listed in Article 45 of Directive 2004/18, it must ensure, in the context of that assessment, that it complies with the principle of proportionality, as defined in paragraph 55 above.

65 Therefore, when applying optional grounds for exclusion from a public procurement procedure, a contracting authority must pay even greater attention to that principle where the exclusion provided for by the national legislation affects the entire group of economic operators not for a failure attributable to all its members, but for a failure merely on the part of one or more of them, where the lead undertaking of that group does not have any control over the economic operator or operators with which it intended to form such a group (see, by analogy, judgments of 30 January 2020, *Tim*, C-395/18, EU:C:2020:58, paragraph 48, and of 7 September 2021, *Klaipėdos regiono atliekų tvarkymo centras*, C-927/19, EU:C:2021:700, paragraph 156).

66 The principle of proportionality requires the contracting authority to carry out a specific and individual assessment of the conduct of the entity concerned (see, to that effect, judgment of 13 December 2012, *Forposta and ABC Direct Contact*, C-465/11, EU:C:2012:801, paragraph 31). On that basis, the contracting authority must have regard to the means available to the tenderer for establishing whether there was a failure on the part of the entity on whose capacities it intended to rely (judgments of 3 June 2021, *Rad Service and Others*, C-210/20, EU:C:2021:445, paragraph 40, and of 7 September 2021, *Klaipėdos regiono atliekų tvarkymo centras*, C-927/19, EU:C:2021:700, paragraph 157).

67 In those circumstances, Article 47(3) and Article 48(4) of Directive 2004/18, read in conjunction with the general principle of proportionality, must be interpreted as precluding national legislation which excludes the possibility for original members of a temporary group of tendering undertakings to withdraw from that group where the period of validity of the tender submitted by that group elapses and the contracting authority seeks to extend the validity of the tenders submitted to it, provided that it is established, first, that the remaining members of that group meet the requirements laid down by the contracting authority and, secondly, that their continued participation in the tendering procedure in question does not place other tenderers at a competitive disadvantage.

The second question

68 By its second question, the referring court asks, in essence, whether the principles of proportionality and of equal treatment, and the obligation of transparency, as set out in Article 2 and recital 2 of Directive 2004/18, must be interpreted as precluding national legislation which provides for the automatic forfeiture of the provisional security provided by a tenderer following its exclusion from a procedure for the award of a public service contract, even though the service in question has not been awarded to it.

69 In that regard, as is apparent from paragraphs 61 and 62 of the judgment of 28 February 2018, *MA.T.I. SUD and Duemme SGR* (C-523/16 and C-536/16, EU:C:2018:122), the setting in advance by the contracting authority of the amount of the provisional security to be provided in the contract notice does indeed meet the requirements arising from the principles of equal treatment

of tenderers, transparency and legal certainty, in that it objectively makes it possible to avoid any discriminatory or arbitrary treatment of those tenderers by that contracting authority. Nevertheless, the automatic forfeiture of that security thus set in advance, irrespective of the nature of the rectifications which might be made by the errant tenderer and, therefore, in the absence of any specific reasons, does not appear to be compatible with the requirements deriving from the principle of proportionality.

70 Similarly, although the forfeiture of that security is an appropriate means of achieving the legitimate objectives pursued by the Member State concerned, relating to the need, first, to place responsibility on the tenderers in submitting their tenders and, secondly, to offset the financial burden on the contracting authority for checking that tenders are in order, the amount of that security in a situation such as that at issue in the main proceedings appears manifestly excessive in the light of the conduct of the contract procedure in question (see, to that effect, judgment of 28 February 2018, *MA.T.I. SUD and Duemme SGR*, C-523/16 and C-536/16, EU:C:2018:122, paragraphs 63 and 64).

71 Therefore, it must be held that the principles of proportionality and of equal treatment, and the obligation of transparency, as set out in Article 2 and recital 2 of Directive 2004/18, must be interpreted as precluding national legislation which provides for the automatic forfeiture of the provisional security provided by a tenderer following its exclusion from a procedure for the award of a public service contract, even though the service in question has not been awarded to it.

Costs

72 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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 (Eighth Chamber) hereby rules:

1. **Article 47(3) and Article 48(4) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, read in conjunction with the general principle of proportionality,**

   must be interpreted as precluding national legislation which excludes the possibility for original members of a temporary group of tendering undertakings to withdraw from that group where the period of validity of the tender submitted by that group elapses and the contracting authority seeks to extend the validity of the tenders submitted to it, provided that it is established, first, that the remaining members of that group meet the requirements laid down by the contracting authority and, secondly, that their continued participation in the tendering procedure in question does not place other tenderers at a competitive disadvantage.

2. **The principles of proportionality and of equal treatment, and the obligation of transparency, as set out in Article 2 and recital 2 of Directive 2004/18,**

   must be interpreted as precluding national legislation which provides for the automatic forfeiture of the provisional security provided by a tenderer following its exclusion from

a procedure for the award of a public service contract, even though the service in question has not been awarded to it.

[Signatures]