Reports of Cases

OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 6 February 2025 [1]

Case C-82/24

Miejskie Przedsiębiorstwo Wodociągów i Kanalizacji w m.st. Warszawie S.A.
v
Veolia Water Technologies sp. z o.o.,
Krüger A/S,
OTV France,
Haarslev Industries GmbH,
Warbud S.A.

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

(Reference for a preliminary ruling – Public procurement – Directive 2004/18/EC – Article 2 – Principles of equal treatment and transparency – Obligation not expressly provided for in either the tender documents or the contract – Additional application of civil legislation referenced by the contract clauses – Renewal of the guarantee resulting from the interpretation of legal provisions applicable by analogy – Reasonably well-informed and normally diligent tenderer)

1. The dispute from which this request for a preliminary ruling arises concerns the guarantee period agreed between the contracting authority and the recipient of a public contract, the subject matter of which was the expansion and modernisation of a sewage treatment plant.

2. The dispute revolves around the possible renewal of the guarantee period, beyond what is explicitly agreed in the contract. The referring court doubts whether such a renewal, imposed unilaterally by the contracting authority, is compatible with the principles enshrined in Article 2 of Directive 2004/18/EC, [2] applicable *ratione temporis*.

[1] Original language: Spanish.

[2] Directive 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).

I. Legal context

A. European Union law

1. Directive 2004/18

3. Article 2 ('Principles of awarding contracts') provides:

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

4. Article 12 ('Contracts in the water, energy, transport and postal services sectors') states:

'This Directive shall not apply to public contracts which, under Directive 2004/17/EC, [3] are awarded by contracting authorities exercising one or more of the activities referred to in Articles 3 to 7 of that Directive and are awarded for the pursuit of those activities, or to public contracts excluded from the scope of that Directive under Article 5(2) and Articles 19, 26 and 30 thereof.

However, this Directive shall continue to apply to public contracts awarded by contracting authorities carrying out one or more of the activities referred to in Article 6 of Directive 2004/17/EC and awarded for those activities, in so far as the Member State concerned takes advantage of the option referred to in the second subparagraph of Article 71 thereof to defer its application.'

5. Article 26 ('Conditions for performance of contracts') states:

'Contracting authorities may lay down special conditions relating to the performance of a contract, provided that these are compatible with Community law and are indicated in the contract notice or in the specifications. The conditions governing the performance of a contract may, in particular, concern social and environmental considerations.'

2. Directive 2004/17/EC

6. According to Article 4 ('Water'):

'1. This Directive shall apply to the following activities:

(a) the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of drinking water; or

(b) the supply of drinking water to such networks.

[3] Directive 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).

2. This Directive shall also apply to contracts or design contests awarded or organised by entities which pursue an activity referred to in paragraph 1 and which:

(a) are connected with hydraulic engineering projects, irrigation or land drainage, provided that the volume of water to be used for the supply of drinking water represents more than 20% of the total volume of water made available by such projects or irrigation or drainage installations, or

(b) are connected with the disposal or treatment of sewage.

…'

7. Article 10 ('Principles of awarding contracts') provides:

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

8. Article 38 ('Conditions for performance of contracts') provides:

'Contracting entities may lay down special conditions relating to the performance of a contract, provided that these are compatible with Community law and are indicated in the notice used as a means of calling for competition or in the specifications. The conditions governing the performance of a contract may, in particular, concern social and environmental considerations.'

B. National legal context

1. (Former) Public Procurement Law of 29 January 2004[4]

9. According to Article 29(1), the specifications are to describe the subject matter of the contract in an unequivocal and exhaustive manner, by means of sufficiently precise and comprehensible terms, taking into account the requirements and circumstances which could affect the preparation of a tender.

10. Article 36(1)(16) provides that the tender specifications are to contain, at least, the provisions essential to the parties, the general terms of the contract or the model contract, if the contracting authority requires the economic operator to conclude a public procurement contract with it on those terms.

2. Civil Code[5]

11. According to Article 353[1]:

'Contracting parties may arrange their legal relationship at their own discretion, as long as the substance or purpose of the contract is not contrary to the properties (nature) of the relationship, the law or the rules of social conduct.'

[4] Ustawa z dnia 29 stycznia 2004 r. Prawo zamówień publicznych (Dz. U. of 2007, No 223, position 1655, as amended).

[5] Ustawa z dnia 23 kwietnia 1964 r. Kodeks cywilny (Dz. U. of 1964, No 16, position 93, as amended).

12. Article 581(1), which appears in the title dealing with contracts of sale, states:

'Where, in the performance of its obligations, the guarantor has provided the beneficiary of the guarantee with an item free from defects in place of a defective item, or has carried out the relevant repairs to the item covered by the guarantee, the guarantee period shall begin again from the moment of delivery of the item free from defects or the return of the repaired item. Where the guarantor has replaced part of the item, this provision shall apply *mutatis mutandis* to the replaced part.'

II. Facts, proceedings and question referred for a preliminary ruling

13. Miejskie Przedsiębiorstwo Wodociągów i Kanalizacji w m.st. Warszawie S.A.[6] ('the contracting authority') published an open contract notice for the award of contract No 8/JRP/R/2008 'Modernisation and expansion of the Czajka sewage treatment plant (thermal treatment of sewage sludge)'.

14. A consortium of undertakings led by Veolia Water Technologies sp. z o.o. ('Veolia'), having its registered office in Warsaw,[7] took part in the procedure and were awarded the contract.

15. On 1 August 2008, the contract was signed by Veolia and the contracting authority.

16. The contract included the construction of a sewage sludge thermal treatment plant, in which two recuperators had to be installed, each of them on an independent waste incineration line.

17. The contract also contained a provision ('warranty card') establishing a guarantee period of 36 months, which would run from the date of delivery of the completion certificate for the work.

18. Subclause 6.1 of the contract stipulated that 'where this warranty card is silent, the relevant provisions of Polish law, including in particular the Civil Code, shall apply'.

19. The work covered by the contract had to be completed before 30 October 2010. However, that deadline was extended to 30 November 2012. On 21 March 2013, the completion certificate for the work was issued.

20. On 26 September 2014 and 3 March 2015, the contracting authority informed Veolia, respectively, that the recuperators of line 2 and line 1 had broken down.

21. In compliance with the warranty card, Veolia replaced the faulty recuperators. The new recuperators were put into operation on 22 February and 28 April 2016, respectively.

22. On 27 November 2018, the contracting authority informed Veolia of a (new) breakdown of the two replacement recuperators and requested that they be repaired or replaced in accordance with the guarantee.

[6] The company responsible for the supply of drinking water and the disposal and treatment of sewage for the city of Warsaw (Poland).

[7] In addition to Veolia, the consortium was made up of Krüger A/S, having its registered office in Søborg (Denmark); OTV France, having its registered office in Saint-Maurice (France); Haarslev Industries GmbH, having its registered office in Bruchsal (Germany); and Warbud S.A., having its registered office in Warsaw. From here on, I shall regard Veolia as acting on behalf of the consortium.

23. Veolia refused to comply with the request, arguing that the period covered by the guarantee had expired.

24. The disagreement between the parties to the contract has given rise to two sets of proceedings before the Sąd Okręgowy w Warszawie (Regional Court, Warsaw, Poland), which that court has joined in order to deal with them together:

– on the one hand, the contracting authority seeks payment from Veolia of EUR 5 661 772.39, by way of contractual penalties, together with a secondary claim; and 11 351 601.62 zlotys (PLN), by way of compensation for improper performance of the contract, or, alternatively, the sum of EUR 2 533 839.65;

– on the other hand, Veolia seeks payment from the contracting authority of EUR 3 766 666.36, equating to the amounts collected by that authority under the bank guarantees provided.

25. Against that background, the court required to rule on those disputes has referred the following question to the Court of Justice for a preliminary ruling:

'Must the principles of transparency, equal treatment and fair competition referred to in Article 2 of Directive 2004/18 … be interpreted as precluding an interpretation of national law that would allow the provisions of a public procurement contract concluded with a consortium consisting of entities from different EU Member States to include an obligation that may indirectly affect the determination of the price contained in the tender submitted by that contractor, which obligation is not expressly provided for in the contract or in the tender documents, but arises from a provision of national law that does not apply directly to that contract, but is applicable by analogy?'

III. Procedure before the Court of Justice

26. The request for a preliminary ruling was received at the Court on 1 February 2024.

27. Written observations were submitted by Veolia, the contracting authority, the Polish Government and the European Commission.

28. It was not considered necessary to hold a hearing.

IV. Assessment

A. Preliminary observations

1. Applicable directive

29. The Commission raises, above all, whether Directive 2004/18 is applicable to the present dispute or whether, conversely, Directive 2004/17 would be. [8]

[8] In accordance with Article 12 of Directive 2004/18, that directive does not apply to public contracts included in the scope of Directive 2004/17.

30. Directive 2004/17 regulates, specifically, contracts or design contests awarded or organised by entities involved in the supply of drinking water by means of fixed distribution networks, provided such contracts are connected, inter alia, with the disposal or treatment of sewage (Article 4(1) and (2) of Directive 2004/17).

31. As the Commission, whose assessment I agree with, notes,[9] everything appears to indicate that Directive 2004/17 is the directive which should be taken into account, since:

– the contracting authority supplies drinking water to the inhabitants of the Warsaw urban area and operates fixed water supply and sewerage networks in Warsaw;

– the subject matter of the contract is the expansion and modernisation of a sewage treatment plant, which includes the disposal or treatment of sewage, activities to which Article 4(2)(b) of Directive 2004/17 expressly refers.

32. It is for the referring court, which has at its disposal all of the information relating to the contract and the activity of the contracting authority, to verify the facts on the basis of which it has to assess which of the two directives applies.

33. In reality, it is a question of little practical importance, since the regulation of the principles of procurement in Directive 2004/18 (Article 2) and in Directive 2004/17 (Article 10) is substantially the same.

34. In any event, I shall focus my attention on the interpretation of Directive 2004/18, which is the directive referred to in the order for reference and on which the participants have focused in the course of the preliminary ruling proceedings.

2. Directive 2004/18 and performance of the contract

35. Deciding whether Article 2 of Directive 2004/18 applies to an incident occurring during the performance of the contract, years after it was awarded and concluded, presents a greater difficulty.

36. The difficulty arises from the fact that the purpose of Directive 2004/18 was the coordination of *procedures for the award* of certain public contracts. In particular, Article 2 of that directive listed three principles which had to be complied with in 'awarding contracts'.

37. Directive 2004/18 regulated extensively the *award* of contracts and contained isolated references to their *performance*. The later Directive 2014/24/EU,[10] by contrast, dedicates a specific chapter to the *performance* of public contracts.[11]

38. That difference in regimes must, however, be put into perspective: matters which Directive 2014/24 groups together in the chapter dedicated to the performance of contracts are dealt with in Directive 2004/18 using a different system, in the title devoted to specifications and contract documents.

[9] Paragraph 35 of its written observations, referencing the website of the contracting authority (https://www.mpwik.com.pl/view/dane-spolki).

[10] Directive 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).

[11] Chapter IV of Title II, Articles 70 to 73, of Directive 2014/24.

39. That occurs, for example, with the provisions relating to the conditions for performance of contracts (Article 70 of Directive 2014/24 and Article 26 of Directive 2004/18) or subcontracting (Article 71 of Directive 2014/24 and Article 25 of Directive 2004/18).

40. With regard to the modification of contracts during their term, even though Directive 2004/18 does not have a provision with content equivalent to Article 72 of Directive 2014/24, the Court had already interpreted Article 2 of Directive 2004/18 as meaning that, following the award of a public contract, a material amendment cannot be made to that contract without a new tendering procedure being initiated. [12]

41. In this legislative context, the application of Directive 2004/18 to the present case could be based on three assumptions: (i) that, in reality, a modification of the contract occurs when the content of a clause of the specifications is interpreted to imply obligations that are not expressly stated in the agreed terms; [13] (ii) that the specifications or contract documents, by including the warranty card in the terms in which they did, were already, from the stage of the award of the contract, not compatible with the principles of Article 2 of Directive 2004/18; and (iii) that the warranty card, in itself, constituted a condition for the performance of the contract.

42. Of those three assumptions, I exclude the possibility that a *modification* of the contract occurred, in which view I concur with the Polish Government. The modification theory comes up against the obstacle that the clause at issue appeared in the contract from the outset. Moreover, it has been applied effectively and without question, when, on the first occasion on which it was requested to do so, Veolia replaced the two faulty recuperators.

43. If Veolia denied the existence of a guarantee obligation to replace the 'second' recuperators, it did not do so because a modification had been made to the contract, but rather because, in its opinion, that contractual obligation had been extinguished due to the expiry of the agreed period of time.

44. Focusing on the warranty card from the perspective of the *award of the contract*, I cannot find any reasons to dispute, in principle, its validity and much less that of the contract as a whole. Reasons of legal certainty and the provisions of the directive on review procedures itself [14] would make it impossible to reopen the debate regarding the lawfulness of an award decision that was accepted and not challenged at the relevant time. [15]

45. In fact, the order for reference indicates that the contractor is not seeking a declaration of invalidity in respect of the award on the basis that the contract contains a guarantee clause which, if it had had the temporal scope which the contracting authority now attributes to it, would have led the contractor not to submit its tender (or to submit a higher price). What it is asking is, simply, that that clause be interpreted as meaning that it does not imply the obligation to replace the faulty recuperators for a second time.

[12] Judgment of 7 September 2016, *Finn Frogne* (C-549/14, EU:C:2016:634, operative part). The amendment had taken place during the performance of the contract.

[13] Paragraph 29 of the Polish Government's written observations.

[14] Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33).

[15] I refer to my Opinion in *Fastned Deutschland* (C-452/23, EU:C:2024:894).

46. In so far as the interpretation favoured by the contracting authority, in order for it to have effect during the performance of the contract, would imply a distortion of the agreed contract clauses (in the sense referred to by the Court in the judgment in *Commission* v *CAS Succhi di Frutta*),[16] the discussion would extend, indirectly, to the terms governing the award of the contract themselves.

47. Lastly, the warranty card could be construed as a special condition in relation to the *performance of the contract*, subject to Article 26 of Directive 2004/18. Under that article, contracting authorities may lay down such a condition, provided that it is compatible with EU law and is indicated in the contract notice or in the specifications.[17]

48. Inasmuch as the warranty card affects the performance of the contractual obligations, once the contract has been signed, there would be no insurmountable obstacle to it being regarded, as a last resort, as a condition for the performance of the contract. Once it had been established that it was stated in the contract notice or in the specifications,[18] it would be necessary to decide whether it was compatible with EU law, in particular with the principles of non-discrimination, equal treatment and transparency.

49. The Court permits the principles of public procurement to be related to the performance of a contract:[19] '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'.[20]

50. The reference to equal treatment, non-discrimination and transparency being repeated in successive recitals of Directive 2014/24, it is logical to interpret Article 18(1) of that directive, which lists those as guiding principles in public procurement, as meaning that they are not confined to the stage of the award of the contract.

51. It is true that that case-law was established in relation to the 2014 procurement directives, which are inapplicable here *ratione temporis*. However, I cannot see any insurmountable obstacle to extending it, despite the differences, to contracts governed by Directive 2004/18, whose principles of procurement (Article 2) are to be complied with at every stage of the life of the contract.

16 Judgment of 29 April 2004 (C-496/99 P, EU:C:2004:236, paragraph 120).

17 In my Opinion in *Riigi Tugiteenuste Keskus* (C-6/20, EU:C:2021:79, point 79), I observed that 'the case-law has paid attention [to] those special conditions in situations where they were imposed as a result of "social … considerations", thus focusing on some of those covered by the open wording of the last part of Article 26 of Directive 2004/18. … There is no reason why they should not be extended to other areas, since the reference to "social and environmental considerations" is given merely as an example ("in particular")'.

18 Reading the order for reference, it appears that the clause at issue appeared in the contract notice and that the applicability of Article 581(1) of the Civil Code is only questioned in view of the fact that, according to Veolia, neither the contract nor the contract notice 'indicated that that provision was applicable to the guarantee provided by the contractors'.

19 The link between Article 18(1) and Article 70 of Directive 2014/24 is made apparent in the judgment of 8 July 2021, *Sanresa* (C-295/20, EU:C:2021:556, paragraph 63 and point 2 of the operative part), and in the judgment of 7 September 2021, *Klaipėdos regiono atliekų tvarkymo centras* (C-927/19, EU:C:2021:700, paragraph 90).

20 Judgment of 26 September 2019, *Vitali* (C-63/18, EU:C:2019:787, paragraph 39). Emphasis added. The case concerned subcontracting, which, as I have already emphasised and like the conditions for performance, Directive 2014/24 regulates in the chapter dedicated to the performance of contracts.

52. If that were not so, an undesirable effect would be produced, to which the Court referred in the judgment in *Commission* v *CAS Succhi di Frutta*: 'If, *when the contract was being performed*, the contracting authority was authorised to amend at will the very conditions of the invitation to tender, where there was no express authorisation to that effect in the relevant provisions, the terms governing the award of the contract, as originally laid down, would be distorted.' [21]

53. Accordingly, I see no obstacle to the Court, in this case, providing the referring court with an interpretation of Article 2 of Directive 2004/18.

B. Answer to the question referred

54. It seems appropriate to begin by reflecting on the terms of the debate between the parties regarding the agreed guarantee clause and the delimitation of its validity:

– In accordance with the contract, a guarantee period was established which began on the date of delivery of the completion certificate for the work and expired 36 months later (that is, no later than 30 April 2015). The guarantee was, then, in effect when the contracting authority informed Veolia of the 'first breakdowns', which Veolia accepted without reservation.

– Conversely, when the contracting authority made Veolia aware of the 'second breakdowns' (27 November 2018), that period of 36 months had already expired. Whether, despite that expiry, the period had begun to run again from the delivery, by Veolia, of the replacement recuperators (respectively, 22 February 2016 for the line 2 recuperator and 28 April 2016 for the line 1 recuperator) to make good the first breakdowns, is disputed.

– According to the contracting authority, the renewal of the period for a further 36 months is due to the application of the general rules of Polish law, to which the warranty card referred. According to subclause 6.1 thereof, for matters on which that warranty card was silent, the relevant provisions of Polish law, including the Civil Code, would apply. According to Article 581(1) of that code, relating to contracts of sale, the guarantee period begins to run again from the moment of delivery of the item free from defects or the return of the repaired item.

– Veolia, by contrast, maintains that the contract, in regulating the warranty card, specified fully and precisely the stipulations relating to the guarantee. Its text implies that the parties to the contract did not intend to apply the renewal of the guarantee beyond what was agreed.

– Veolia adds that Article 581(1) of the Civil Code, a provision relating to contracts of sale, was not applicable. Neither the parties, in the contract, nor the contracting authority, in the contract notice, indicated that that provision would extend to the guarantee provided. Its application by analogy would be incompatible with the principles of transparency, equal treatment and fair competition referred to in Directive 2004/18, as it would imply a reference to conditions which do not clearly arise from the tender documents or the current provisions of national law, but only from the interpretation of those provisions.

55. The court *a quo* gives, as reasons for the request for a preliminary ruling, some reasons relating to national law (paragraphs 34 to 42 of the order for reference) and others relating to EU law (paragraphs 44 to 53 of that order).

[21] Judgment of 29 April 2004 (C-496/99 P, EU:C:2004:236, paragraph 120). Emphasis added.

56. I believe that that approach to the presentation may help to understand the question referred better. Before addressing whether a contract clause, or its interpretation, complies with Directive 2004/18, it is necessary to clarify what *reading* the referring court gives to it.

57. In principle, it is for the referring court and not the Court to interpret the clauses of the contracts regarding which disputes between parties arise, taking into consideration their wording, the intention of the contracting parties and the rules of national law which govern those contracts.

58. Starting from that premiss, the referring court must clarify whether, as far as national law is concerned, the warranty card: (i) regulated exhaustively the period for which it would have effect, that is, 36 months following the delivery of the completion certificate for the work, such that its renewal would not be imposed; or (ii) led, by means of subclause 6.1, to the renewal of that period when the supplementary provisions of Polish law and, in particular, those of the Civil Code were applicable.

59. If the referring court accepted the first of those two solutions, the dispute would be settled and it is likely that it would not have requested a preliminary ruling from the Court.

60. Everything appears to indicate, however, that the referring court does not rule out the application of the provisions of the Civil Code to the present dispute (that is, the second of the options mentioned above).

61. In fact, it states in the order for reference that 'to the extent that warranty on the subject matter of the construction contract is not governed by contractual provisions, the provisions of the Civil Code on guarantee at sale should apply thereto'. [22] In its opinion, 'national public procurement law … does not preclude the application by analogy of provisions of national law which are not explicitly referred to in the contractual provisions, in the tender documents, and in the laws governing the type of contract which the tender concerns'. [23]

62. The reflections that I shall set out below have to take as their premiss the interpretation which the referring court gives to the contract at issue. I shall pay particular attention to the application of the principle of transparency, which is closely linked to that of equal treatment.

63. In the words of the Court, 'the obligation of transparency, which is a corollary of the principle of equality, is essentially intended to ensure that any interested operator may take the decision to tender for contracts on the basis of all the relevant information and to preclude any risk of favouritism or arbitrariness on the part of the licensing authority'. [24]

64. The obligation of transparency has two aspects:

– first, '[it] requires there to be a degree of publicity on the part of the contracting authority sufficient to enable, on the one hand, competition to be opened up and, on the other, the impartiality of the award procedure to be reviewed'; [25]

[22] Order for reference, paragraph 39.

[23] Order for reference, paragraph 41.

[24] Judgment of 22 June 2017, *Unibet International* (C-49/16, EU:C:2017:491, paragraph 46).

[25] Judgment of 4 April 2019, *Allianz Vorsorgekasse* (C-699/17, EU:C:2019:290, paragraph 61).

– second, 'it implies that all the conditions and detailed rules governing the award procedure must be drawn up in a clear, precise and unequivocal manner so that … all reasonably informed tenderers exercising ordinary care can understand their exact significance and interpret them in the same way …'. [26]

65. It is the latter aspect that is relevant to this case. As I have already set out, the crux of the dispute lies in deciding whether, given the terms in which the contract was drafted, Veolia was in a position to know what it was actually committing to with its signature.

66. The referring court focuses, in particular, on the possible application of the judgment in *Pizzo* [27] to the case before it, while acknowledging that the former case referred to the exclusion of a tenderer from the award procedure and that this one refers to an incident arising during the performance of the contract.

67. In the order for reference, having transcribed paragraph 51 of the judgment in *Pizzo*, [28] the referring court:

– proposes a 'broader application' of the case-law established in the judgment in *Pizzo*. Thus, 'where the obligations … do not arise directly from the applicable national law and tender documents, those obligations must not be derived solely from an interpretation of a national law'; [29]

– questions whether reasonably well-informed and diligent tenderers are in a position to calculate the price they submit in their tenders, if the scope of their obligations, as far as the guarantee is concerned, is determined by applying, by analogy, certain provisions (designed for a different category of contracts) the interpretation of which is derived from the practice of the national authorities, which, moreover, is not uniform. [30]

68. *Pizzo* concerned the exclusion of a tenderer for failing to meet one of the eligibility requirements for taking part in the procurement procedure. The requirement determining the tenderer's exclusion was not expressly stated in the contract notice or in the specifications, but rather could be deduced from national rules of general application.

69. The Court rejected the idea that the principle of equal treatment and the obligation of transparency had been complied with in *Pizzo*. In its opinion, to put it very succinctly, an interpretation of the terms of the specifications which participants in the award procedure (especially in the case of foreign operators) could not reasonably foresee was not acceptable.

[26] *Ibidem*, paragraph 62.

[27] Judgment of 2 June 2016, *Pizzo* (C-27/15, 'the judgment in *Pizzo*', EU:C:2016:404).

[28] '… the principle of equal treatment and the obligation of transparency must be interpreted as precluding an economic operator from being excluded from a procedure for the award of a public contract as a result of that economic operator's non-compliance with an obligation which does not expressly arise from the documents relating to that procedure or out of the national law in force, but from an interpretation of that law and those documents and from the incorporation of provisions into those documents by the national authorities or administrative courts. …'

[29] Order for reference, paragraph 53.

[30] Order for reference, paragraph 53, *in fine*.

70. Certainly, the judgment in *Pizzo* interpreted the principle of equal treatment and the obligation of transparency in the context of an award procedure. However, if it were accepted, as I have proposed,[31] that Article 2 of Directive 2004/18 may also be relied on, *mutatis mutandis*, in circumstances such as those of the present dispute, it would not be problematic to extend to this dispute the pronouncements of the Court in that judgment.

71. Having established that premiss, it is for the referring court to assess the extent to which an interpretation of the warranty card (including subclause 6.1) allowing the contracting authority to require the renewal of the agreed period was or was not reasonably foreseeable by a diligent operator.

72. In order to make that assessment, two approaches may be taken, depending on whether only the strict and literal terms of the warranty card are taken into account, rather than the subjective conditions of the operator and the contractual and legislative context, or, conversely, whether greater attention is paid to the latter factors.

73. Whichever approach is taken, the key, in my opinion, is the (reasonable) foreseeability of the solution accepted. That foreseeability is, in turn, related to the operator's knowledge of national law and the level of legal certainty which that law has to provide to economic operators in the context of public procurement.

74. In that regard, as the referring court correctly emphasises, the duration of the guarantee period is a relevant factor if economic operators are to be able to set the prices of their tenders appropriately. Such periods should be clearly stated in the specifications and other contract documents.

75. A distortion of competition to the detriment of economic operators from other Member States could, moreover, arise, if those operators, relying on the wording of the guarantee clause, are ultimately presented with an interpretation of its content which they could not reasonably have foreseen.

76. The terms of the contract must, by themselves, allow all interested parties to understand their content and their scope. Only that way are the essential transparency and legal certainty ensured.

77. In my Opinion in *Pizzo*, I stated that 'it would be illogical for all contracting authorities to be obliged also to specify those conditions the fulfilment of which is required by generally applicable legislative provisions of which a reasonably informed tenderer exercising ordinary care cannot be unaware'.[32]

78. I reiterate that statement now, but that should not be understood to imply my acquiescence in the acceptance of contractual obligations the foreseeability of which cannot reasonably be deduced from the wording of the contract itself, even when combined with those general legislative provisions which are indisputably applicable.

[31] Points 35 to 53 of this Opinion.

[32] Opinion in *Pizzo* (C-27/15, EU:C:2016:48, point 52). I should note that, in *Pizzo*, the documents relating to the call for tenders did not include any reference to the condition which resulted in the exclusion of the tenderers (the failure to pay a fee established by law). Here, the warranty card signed by Veolia is regulated in the contract and, for anything not regulated there, it makes express reference to the 'the relevant provisions of Polish law, including in particular the Civil Code'.

79. The referring court must, therefore, assess whether, in this case, an interpretation of the warranty card which, going beyond its express wording, allowed the additional application of provisions of the Polish Civil Code relating to the renewal of guarantee periods in contracts of sale was acceptable.

80. In order to assist with that assessment, the Court may provide the referring court with the following guidance:

– If the parties to the contract expressly agree a specific guarantee period, specifying its duration and its start and end dates, without providing for its renewal, those rules could be regarded as complete and self-enclosed. There would, then, be no need to have recourse to general provisions of national law, since the wishes of the contracting parties, the lawfulness of which could not be doubted, would have been clearly expressed.

– The content of subclause 6.1 extends only to 'where this warranty card is silent'. As the guarantee period was a *matter regulated* in that warranty card, the content of subclause 6.1 would not come into play.

– If the application of the provisions of the Civil Code (which would be additional, more than by analogy) were accepted, the interpretation of the rules of Article 581(1) of that code should be imposed on the basis of evidence that left no room for doubt on the part of a diligent and reasonably well-informed operator. [33]

– The order for reference does not appear to imply that an interpretation of Article 581(1) of the Civil Code extending the rules for contracts of sale to contracts for works is shared unanimously by the case-law or by the majority of national courts. [34] Rather, there are doubts regarding the legal viability of such an interpretation.

– In the absence of an explicit reference to the guarantee required for contracts of sale (usually conceived with the aim of protecting consumers), the logic inherent in the guarantee provided in works contracts concluded between professionals is, from an economic perspective, different. [35]

– In order to discern whether, in spite of everything, the consortium of which Veolia formed part was in a position to be reasonably aware, from the start, of the interpretation of the warranty card which the contracting authority later asserted, factors such as the lead company or another member of the consortium being established in Poland, or its experience in the area of construction work to which the subject matter of the contract belongs, could be taken into consideration.

[33] The Polish Government accepts that the interpretation of the contract to imply an obligation not expressly provided for in it, but which is derived from the national provisions to which it refers, would be viable to the extent that a reasonably well-informed and normally diligent contractor could not be unaware of those provisions (paragraph 47 of its written observations).

[34] Paragraph 39 of the order for reference: 'The application of the provisions on guarantees to construction contracts by analogy to contracts of sale has been a matter of dispute both in the case-law of national courts and in jurisprudence.' Paragraph 36 of that order states that 'on 25 December 2014, an amendment was introduced to Article 638 of the Civil Code governing contracts for a specific work: paragraph 2 was added, under which, where the buyer has been issued with a guarantee for the completion of a specific work, the provisions on guarantee at sale apply *mutatis mutandis*, but that regulation does not apply in the case at issue'.

[35] Veolia refers to this point in footnote 3 to its written observations, underlining that the repair or replacement of the elements of an installation involves costs and risks that are very different from those inherent in the sale of consumer goods to the public (the production of which is characterised by a minimum marginal cost). The guarantees provided in the different types of contracts cannot, therefore, be considered equivalent to each other.

– Similarly, it could be relevant if the interpretation given to the content of the warranty card by the contracting authority was sufficiently well known in the sector, such that Veolia or other members of the consortium could easily find out about it, taking advice, where necessary, on the temporal extent of the guarantee, in light of the provisions of the Polish Civil Code.

81. In short, it is my view that the principles laid down in Article 2 of Directive 2004/18 do not, as a general rule, preclude the inclusion in a public works contract of a clause which, in order to establish the temporal scope of a guarantee obligation on the part of the contractor and for matters on which that clause is silent, refers to the provisions of the national civil code. Those principles are not, however, compatible with an interpretation of that clause which, by extending the guarantee period beyond what was agreed by the parties, could not be foreseen by a reasonably well-informed and normally diligent contractor. It is for the referring court to determine whether that is the situation arising in this case.

V. Conclusion

82. In accordance with the foregoing, I propose that the Court should reply to the Sąd Okręgowy w Warszawie (Regional Court, Warsaw, Poland) as follows:

Article 2 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts

must be interpreted as not precluding the inclusion in a public works contract of a clause which, in order to establish the temporal scope of a guarantee obligation on the part of the contractor and for matters on which that clause is silent, refers to the provisions of the national civil code.

The principles of equal treatment and transparency laid down in Article 2 of Directive 2004/18 are not, however, compatible with an interpretation of that clause which, by extending the guarantee period beyond what was agreed by the parties, could not be foreseen by a reasonably well-informed and normally diligent contractor. It is for the referring court to determine whether that is the situation arising in this case.