Reports of Cases

JUDGMENT OF THE COURT (Tenth Chamber)

11 June 2020*

(Reference for a preliminary ruling — Public works contracts, public supply contracts and public service contracts — Directive 2014/24/EU — Procurement procedure for the award of a service contract — Architectural and engineering services — Article 19(1) and Article 80(2) — National legislation limiting participation solely to economic operators in certain legal forms)

In Case C-219/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio, Italy), made by decision of 16 January 2019, received at the Court on 11 March 2019, in the proceedings

Parsec Fondazione Parco delle Scienze e della Cultura

v

Ministero delle Infrastrutture e dei Trasporti,

Autorità nazionale anticorruzione (ANAC),

THE COURT (Tenth Chamber),

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

Advocate General: P. Pikamäe,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Parsec Fondazione Parco delle Scienze e della Cultura, by A. Pontenani and I. Cecchi, avvocati,

– the Italian Government, by G. Palmieri, acting as Agent, and C. Pluchino, avvocato dello Stato,

– the European Commission, by G. Gattinara, P. Ondrůšek and L. Haasbeek, 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 recital 14, Article 19(1) and Article 80(2) 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).

2 The request has been made in proceedings between Parsec Fondazione Parco delle Scienze e della Cultura ('Parsec'), on the one hand, and Ministero delle Infrastrutture e dei Trasporti (Ministry of Infrastructure and Transport) and Autorità nazionale anticorruzione (ANAC) (National Anti-Corruption Authority, Italy), on the other hand, concerning the latter's decision rejecting Parsec's application for inclusion in the national register of engineering firms and firms of professionals entitled to provide architectural and engineering services.

Legal context

European Union law

3 Under recital 14 of Directive 2014/24:

'It should be clarified that the notion of "economic operators" should be interpreted in a broad manner so as to include any persons and/or entities which offer the execution of works, the supply of products or the provision of services on the market, irrespective of the legal form under which they have chosen to operate. Thus, firms, branches, subsidiaries, partnerships, cooperative societies, limited companies, universities, public or private, and other forms of entities than natural persons should all fall within the notion of economic operator, whether or not they are "legal persons" in all circumstances.'

4 Article 2(1) of that directive, that article being entitled 'Definitions', provides:

'For the purposes of this Directive, the following definitions apply:

…

10. "economic operator" means any natural or legal person or public entity or group of such persons and/or entities, including any temporary association of undertakings, which offers the execution of works and/or a work, the supply of products or the provision of services on the market;

…'

5 Article 19(1) of that directive, that article being entitled 'Economic operators', provides:

'Economic operators that, under the law of the Member State in which they are established, are entitled to provide the relevant service, shall not be rejected solely on the ground that, under the law of the Member State in which the contract is awarded, they would be required to be either natural or legal persons.

However, in the case of public service and public works contracts as well as public supply contracts covering in addition services or siting and installation operations, legal persons may be required to indicate, in the tender or the request to participate, the names and relevant professional qualifications of the staff to be responsible for the performance of the contract in question.'

6 Article 80 of the directive, entitled 'Rules on the organisation of design contests and the selection of participants', provides:

'1. When organising design contests, contracting authorities shall apply procedures which are adapted to the provisions of Title I and this Chapter.

2. The admission of participants to design contests shall not be limited:

(a) by reference to the territory or part of the territory of a Member State;

(b) on the grounds that, under the law of the Member State in which the contest is organised, they would be required to be either natural or legal persons.

3. Where design contests are restricted to a limited number of participants, the contracting authorities shall lay down clear and non-discriminatory selection criteria. In any event, the number of candidates invited to participate shall be sufficient to ensure genuine competition.'

Italian law

7 Decreto legislativo n. 50 — Attuazione delle direttive 2014/23/UE, 2014/24/UE e 2014/25/UE sull'aggiudicazione dei contratti di concessione, sugli appalti pubblici e sulle procedure d'appalto degli enti erogatori nei settori dell'acqua, dell'energia, dei trasporti e dei servizi postali, nonché per il riordino della disciplina vigente in materia di contratti pubblici relativi a lavori, servizi e forniture (Legislative Decree No 50 implementing Directives 2014/23/EU, 2014/24/EU and 2014/25/EU on the award of concession contracts, on public procurement and on procurement by entities operating in the water, energy, transport and postal services sectors, and reforming the existing provisions in relation to public works, service and supply contracts) of 18 April 2016 (ordinary supplement to GURI No 91 of 19 April 2016) constitutes the Codice dei contratti pubblici (Public Procurement Code).

8 Whereas Article 45 of that code defines in broad terms the concept of economic operator allowed to take part in procurement procedures for the award of public contracts, Article 46 thereof establishes a special regime for architectural and engineering services. Under the latter provision:

'1. Participation in procurement procedures in relation to architectural and engineering services is open to the following:

(a) providers of engineering and architectural services: independent or associated professionals, firms of professionals as referred to in subparagraph (b), engineering firms as referred to in subparagraph (c), consortia, European Economic Interest Groupings (EEIGs), temporary groupings of the abovementioned forms, which provide public and private customers operating on the market with engineering and architectural services as well as technical and administrative activities, and economic and financial feasibility studies related to these activities, including, as regards measures relating to the restoration and maintenance of movable property and surfaces decorated with architectural objects, persons qualified as restorers of cultural objects in accordance with the regulations in force;

(b) firms of professionals: firms constituted exclusively from among professionals enrolled with the respective professional associations provided for by the professional regulations in force, in the form of partnerships as referred to in Chapters II, III and IV of Title V of Book V of the Civil Code and in the form of cooperative societies as referred to in Chapter I of Title VI of Book V of the Civil Code, which provide private and public developers with engineering and architectural services such as feasibility studies, research, consultations, design or site management work, technical and economic feasibility assessments or environmental impact assessments;

(c) engineering firms: limited liability companies as referred to in Chapters V, VI and VII of Title V of Book V of the Civil Code, or in the form of cooperative societies as referred to in Chapter I of Title VI of Book V of the Civil Code, which do not meet the conditions to be classified as firms of professionals, and which carry out feasibility studies, research, consultancy, design or site management work, technical and economic feasibility studies or impact assessments as well as other goods production activities associated with the provision of these services;

(d) providers of engineering and architectural services identified under CPV codes 74200000-1 to 74276400-8, 74310000-5 to 74323100-0 and 74874000-6 established in other Member States, constituted in accordance with the legislation in force in the respective countries;

(e) temporary groupings constituted from among the forms referred to in subparagraphs (a) to (d);

(f) permanent groupings of firms of professionals and of engineering firms, including in a mixed form, consisting of at least three members that have operated in the sectors of engineering and architectural services.

2. For the purpose of taking part in the procurement procedures referred to in paragraph 1, firms may, within five years from their constitution, show compliance with the economic/financial and technical/organisational conditions required in the contract notice, including the conditions relating to the members of the firm where the firm is constituted in the form of a partnership or a cooperative society, and those relating to the technical managers or professionals employed on a permanent basis by the firm, where the latter is constituted in the form of a limited liability company.'

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

9 Parsec is a non-profit-making private-law foundation constituted in accordance with the Italian Civil Code.

10 Its seat is located in Prato (Italy) and, as provided for in its founding document, it is active inter alia in the study of natural disasters, the detection and prevention of risk conditions, environmental and land use planning, management and monitoring as well as civil and environmental protection. It created a seismology 'observatory' in its midst, which operates in stable cooperation with the Istituto nazionale di geofisica e vulcanologia (National Institute of Geophysics and Volcanology, Italy). Through that observatory, Parsec manages a network of stations for measuring seismic activity, works in cooperation with universities and research bodies, and provides seismic risk management, civil protection and land use planning services for the benefit of numerous municipalities and local authorities. It carries out all of those activities thanks to staff that is highly qualified in that field.

11 In order to be able to take part in tendering procedures for the service of classifying the territory according to seismic risk, Parsec lodged an application for inclusion in ANAC's register of operators entitled to provide engineering and architectural services. However, since Parsec did not fall within any of the categories of economic operators referred to in Article 46(1) of the Public Procurement Code, ANAC issued a decision rejecting the application for inclusion, against which Parsec lodged an action before the referring court, namely the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio, Italy).

12 Before that court, both the Ministry for Infrastructure and Transport and ANAC submit, as a preliminary point, that the fact that Parsec is not included in ANAC's register of economic operators as referred to in Article 46 of the Public Procurement Code does not preclude it from taking part in the tendering procedures for the services in question.

13 The referring court notes, in the first place, that the services covered by the proceedings before it, namely seismic services and that of classifying the territory according to seismic risk, fall within the architectural and engineering services referred to in the Public Procurement Code. For the performance of services, Article 46 of the code provides that participation in the tendering procedures is open solely to certain categories of operators, which do not include non-profit-making bodies such as Parsec. According to the referring court, this is due to the fact, that since those bodies may not enrol on ANAC's register, it is impossible for the contracting authority to verify the professional characteristics of such bodies wishing to submit a tender.

14 In the second place, the referring court is of the opinion that that special rule, which has the effect of limiting the scope of the concept of 'economic operator' set out in Article 45 of the Public Procurement Code, can be justified by the significant degree of professionalism required of the tenderers to guarantee the quality of the services they would have to provide and by a 'presumption' that the persons providing those services on a continuous professional basis, subject to remuneration, are more likely to have performed their activity without interruption and to have undergone professional development training.

15 In the third place, the referring court states that in its judgment of 23 December 2009, *CoNISMa* (C-305/08, EU:C:2009:807), the Court declared the incompatibility with EU law of Italian legislation that prohibited entities which were primarily non-profit-making from taking part in a procurement procedure for the award of public contracts, even though such entities were entitled to offer the services covered by the contract in question. According to the referring court, while the Italian legislature in Article 45 of the Public Procurement Code — which defines in broad terms the concept of 'economic operator' — reproduced the Court's broad definition of that concept in that judgment, by adopting Article 46 of the code, it chose a narrower definition for architectural and engineering services.

16 In view of the general guidance given in that judgment, the referring court asks whether under EU law Member States may nonetheless adopt narrower definitions with regard to the services covered by the dispute in the main proceedings. In that regard, it notes that under the wording of Article 19(1) and that of Article 80(2) of Directive 2014/24, even if only by implication, it seems that Member States may limit participation in procurement procedures for the award of public contracts solely to natural persons and certain legal persons. It notes, in addition, that economic operators established in another Member State are not affected by the restrictive definition provided for in Article 46 of the Public Procurement Code given the applicability to those operators of the general rule set out in Article 45(1) of that code, according to which, in line with the provisions of Article 80(2) of Directive 2014/24, those operators are permitted to take part in procurement procedures for the award of contracts according to the legislation of the Member State in which they are established.

17 In those circumstances, the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Does recital 14 in conjunction with Articles 19(1) and 80(2) of Directive [2014/24] preclude a legal provision such as Article 46 of [the Public Procurement Code], by which the Italian Republic transposed Directives 2014/23, 2014/24 and 2014/25 into national law, which permits only economic operators created in the legal forms indicated in that provision to take part in tendering procedures for the award of "architectural and engineering services", which has the effect of excluding from participation in such procedures economic operators that perform such services using a different legal form?'

Consideration of the question referred

18 By its question, the referring court asks, in essence, whether Article 19(1) and Article 80(2) of Directive 2014/24, read in the light of recital 14 thereof, are to be interpreted as precluding national legislation that prevents non-profit-making entities from being able to take part in a procurement procedure for the award of a public contract for engineering and architectural services, even though those entities are entitled under national law to offer the services covered by the contract in question.

19 As a preliminary point, it is important to note that it is apparent from the request for a preliminary ruling that under the national legislation applicable to the dispute in the main proceedings, a foundation such as Parsec, whose activity is non-profit-making, is not allowed to take part in a procurement procedure for the award of a public contract for engineering and architectural services, even though that entity is entitled under national law to offer the services covered by the contract in question.

20 The Court has previously held, in paragraphs 47 to 49 of the judgment of 23 December 2009, *CoNISMa* (C-305/08, EU:C:2009:807), with regard to national legislation that transposed into domestic law 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), that Member States have indeed a discretion as to whether or not to allow certain categories of economic operators to provide certain services and they can, inter alia, determine whether or not entities which are non-profit-making and whose primary object is teaching and research are authorised to operate on the market, according to whether the activity in question is compatible with their objectives as an institution and those laid down in their statutes. However, if and to the extent that such entities are entitled to offer certain services on the market, national law cannot prohibit them from taking part in procurement procedures for the award of public contracts for the provision of those services.

21 That case-law of the Court was confirmed in respect of that directive (judgments of 19 December 2012, *Ordine degli Ingegneri della Provincia di Lecce and Others*, C-159/11, EU:C:2012:817, paragraph 27, and of 6 October 2015, *Consorci Sanitari del Maresme*, C-203/14, EU:C:2015:664, paragraph 35) as well as the directive that it replaced, namely Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1) (judgment of 18 December 2014, *Data Medical Service*, C-568/13, EU:C:2014:2466, paragraph 36).

22 That case-law of the Court remains relevant with the entry into force of Directive 2014/24, which repealed and replaced Directive 2004/18. In addition to the fact that the concept of 'economic operator' set out in Article 1(8) of Directive 2004/18 was reproduced, without substantial modification, in point 10 of Article 2(1) of Directive 2014/24, recital 14 thereof now states explicitly that that concept is to be interpreted 'in a broad manner', so as to include any persons or entities active on the market 'irrespective of the legal form under which they have chosen to operate'. Similarly, both Article 19(1) and Article 80(2) of the directive explicitly provide that an economic operator cannot be precluded from taking part solely on the ground that, under national law, it would be required to be either a natural or a legal person.

23 It follows that, in accordance with the Court's case-law set out in paragraphs 20 and 21 above, national law cannot prohibit a non-profit-making foundation entitled to offer certain services on the domestic market from taking part in procurement procedures for the award of public contracts for the provision of those services.

24 That interpretation cannot be challenged on the ground, put forward by the referring court in its request for a preliminary ruling and referred to in the Italian Government's written observations, that the narrow definition of the concept of 'economic operator' set out in Article 46 of the Public

Procurement Code in the context of services relating to architecture and engineering are justified by the significant degree of professionalism required to guarantee the quality of those services and by an alleged presumption that the persons providing those services on a continuous professional basis, subject to remuneration, are more likely to have performed their activity without interruption and to have undergone professional development training.

25 In the first place, as observed by the European Commission, the Italian Government has not established the existence of any specific correlation between, on the one hand, the degree of professionalism demonstrated in providing a service and, consequently, the quality of the service provided, and, on the other hand, the legal form of the economic operator providing that service.

26 In the second place, with regard to the 'presumption' that the persons providing services in relation to architecture and engineering on a professional basis and subject to remuneration are more likely to have performed their activity without interruption and to have undergone professional development training, suffice it to note that such a presumption cannot prevail in EU law since it is incompatible with the Court's case-law set out in paragraph 20 above, from which it follows that to the extent that an entity is entitled under national law to offer on the market engineering and architectural services in the Member State concerned, it cannot be precluded from being able to take part in a procurement procedure for the award of a public contract concerning the provision of those services.

27 Lastly, it should be added that the EU legislature appreciated the importance, for candidates and tenderers in the case of public service contracts and public works contracts as well as certain public supply contracts, of presenting a high degree of professionalism. It is to that end that it provided, in Article 19(1) of Directive 2014/24, that legal persons may be required to indicate in their offers or the request to participate, the names and relevant professional qualifications of the staff to be responsible for the performance of the contract in question. By contrast, the EU legislature, to that same end, did not introduce a different treatment on account of the legal form under which such candidates and tenderers have chosen to operate.

28 The answer to the question referred is therefore that Article 19(1) and Article 80(2) of Directive 2014/24, read in the light of recital 14 thereof, are to be interpreted as precluding national legislation that prevents non-profit-making entities from being able to take part in a procurement procedure for the award of a public contract for engineering and architectural services, even though those entities are entitled under national law to offer the services covered by the contract in question.

Costs

29 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 (Tenth Chamber) hereby rules:

Article 19(1) and Article 80(2) 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, read in the light of recital 14 thereof, are to be interpreted as precluding national legislation that prevents non-profit-making entities from being able to take part in a procurement procedure for the award of a public contract for engineering and architectural services, even though those entities are entitled under national law to offer the services covered by the contract in question.

[Signatures]