Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

20 May 2021 *

(Reference for a preliminary ruling – Public supply contracts – Directive 2004/18/EC – Articles 2 and 46 – Project financed by the Fund for European Aid to the Most Disadvantaged – Criteria for the selection of tenderers – Regulation (EC) No 852/2004 – Article 6 – Requirement of a registration certificate or approval issued by the national food safety authority of the State in which the contract is to be performed)

In Case C-6/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tallinna Ringkonnakohus (Court of Appeal, Tallinn, Estonia), made by decision of 19 December 2019, received at the Court on 7 January 2020, in the proceedings

Sotsiaalministeerium

v

Riigi Tugiteenuste Keskus, formerly Innove SA,

intervener:

Rahandusministeerium,

THE COURT (Fourth Chamber),

composed of M. Vilaras, President of the Chamber, N. Piçarra, D. Šváby (Rapporteur), S. Rodin and K. Jürimäe, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the Estonian Government, by N. Grünberg, acting as Agent,

* Language of the case: Estonian.

– the European Commission, by P. Ondrůšek and W. Farrell, L. Haasbeek and E. Randvere, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 28 January 2021,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 2 and 46 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), and the principle of the protection of legitimate expectations.

2 The request has been made in proceedings between the Sotsiaalministeerium (Ministry of Social Affairs, Estonia) and Riigi Tugiteenuste Keskus (shared services centre for the State), formerly Innove SA, concerning the financial correction decision by which the latter rejected certain requests for payment submitted by that ministry in connection with a project to purchase and distribute food aid to the most disadvantaged persons.

Legal context

EU Law

Directive 2004/18

3 Recital 42 of Directive 2004/18 states:

‘The relevant Community rules on mutual recognition of diplomas, certificates or other evidence of formal qualifications apply when evidence of a particular qualification is required for participation in a procurement procedure or a design contest.’

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

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

5 Article 26 of that directive, entitled ‘Conditions for performance of contracts’, provides:

‘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.’

6 Chapter VII of Title II of Directive 2004/18, entitled 'Conduct of the procedure', includes Section 1, entitled 'General provisions'. The latter consists solely of Article 44 of that directive, entitled 'Verification of the suitability and choice of participants and award of contracts', which is worded as follows:

'1. Contracts shall be awarded on the basis of the criteria laid down in Articles 53 and 55, taking into account Article 24, after the suitability of the economic operators not excluded under Articles 45 and 46 has been checked by contracting authorities in accordance with the criteria of economic and financial standing, of professional and technical knowledge or ability referred to in Articles 47 to 52, and, where appropriate, with the non-discriminatory rules and criteria referred to in paragraph 3.

2. The contracting authorities may require candidates and tenderers to meet minimum capacity levels in accordance with Articles 47 and 48.

The extent of the information referred to in Articles 47 and 48 and the minimum levels of ability required for a specific contract must be related and proportionate to the subject-matter of the contract.

These minimum levels shall be indicated in the contract notice.

…'

7 Section 2 of that chapter, entitled 'Criteria for qualitative selection', comprises Articles 45 to 52 of that directive.

8 Pursuant to Article 46 of that directive, entitled 'Suitability to pursue the professional activity':

'Any economic operator wishing to take part in a public contract may be requested to prove its enrolment, as prescribed in his Member State of establishment, on one of the professional or trade registers or to provide a declaration on oath or a certificate as described in Annex IX A for public works contracts, in Annex IX B for public supply contracts and in Annex IX C for public service contracts.

In procedures for the award of public service contracts, in so far as candidates or tenderers have to possess a particular authorisation or to be members of a particular organisation in order to be able to perform in their country of origin the service concerned, the contracting authority may require them to prove that they hold such authorisation or membership.'

9 Article 48 of that directive, entitled 'Technical and/or professional ability', provides:

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

2. Evidence of the economic operators' technical abilities may be furnished by one or more of the following means according to the nature, quantity or importance, and use of the works, supplies or services:

…

(d) where the products or services to be supplied are complex or, exceptionally, are required for a special purpose, a check carried out by the contracting authorities or on their behalf by a competent official body of the country in which the supplier or service provider is established, subject to that body's agreement, on the production capacities of the supplier or the technical capacity of the service provider and, if necessary, on the means of study and research which are available to it and the quality control measures it will operate;

…

(j) with regard to the products to be supplied:

…

(ii) certificates drawn up by official quality control institutes or agencies of recognised competence attesting the conformity of products clearly identified by references to specifications or standards.

…'

10 Article 49 of that directive, entitled 'Quality assurance standards', states:

'Should they require the production of certificates drawn up by independent bodies attesting the compliance of the economic operator with certain quality assurance standards, contracting authorities shall refer to quality assurance systems based on the relevant European standards series certified by bodies conforming to the European standards series concerning certification. They shall recognise equivalent certificates from bodies established in other Member States. They shall also accept other evidence of equivalent quality assurance measures from economic operators.'

11 Pursuant to Article 50 of that directive, which relates to 'environmental management standards':

'Should contracting authorities, in the cases referred to in Article 48(2)(f), require the production of certificates drawn up by independent bodies attesting the compliance of the economic operator with certain environmental management standards, they shall refer to the Community Eco-Management and Audit Scheme (EMAS) or to environmental management standards based on the relevant European or international standards certified by bodies conforming to Community law or the relevant European or international standards concerning certification. They shall recognise equivalent certificates from bodies established in other Member States. They shall also accept other evidence of equivalent environmental management measures from economic operators.'

12 Article 52 of Directive 2004/18, which is entitled 'Official lists of approved economic operators and certification by bodies established under public or private law', provides:

'1. Member States may introduce either official lists of approved contractors, suppliers or service providers or certification by certification bodies established in public or private law.

Member States shall adapt the conditions for registration on these lists and for the issue of certificates by certification bodies to the provisions of Article 45(1), Article 45(2)(a) to (d) and (g), [Article] 46, Article 47(1), (4) and (5), Article 48(1), (2), (5) and (6), Article 49 and, where appropriate, Article 50.

…

2. Economic operators registered on the official lists or having a certificate may, for each contract, submit to the contracting authority a certificate of registration issued by the competent authority or the certificate issued by the competent certification body. The certificates shall state the references which enabled them to be registered in the list/to obtain certification and the classification given in that list.

3. Certified registration on official lists by the competent bodies or a certificate issued by the certification body shall not, for the purposes of the contracting authorities of other Member States, constitute a presumption of suitability except as regards [Article] 45(1) and (2)(a) to (d) and (g), Article 46, Article 47(1)(b) and (c), and Article 48(2)(a)(i), (b), (e), (g) and (h) in the case of contractors, (2)(a)(ii), (b), (c), (d) and (j) in the case of suppliers and [(2)](a)(ii) and (c) to (i) in the case of service providers.

4. Information which can be deduced from registration on official lists or certification may not be questioned without justification. With regard to the payment of social security contributions and taxes, an additional certificate may be required of any registered economic operator whenever a contract is offered.

The contracting authorities of other Member States shall apply paragraph 3 and the first subparagraph of this paragraph only in favour of economic operators established in the Member State holding the official list.

5. For any registration of economic operators of other Member States in an official list or for their certification by the bodies referred to in paragraph 1, no further proof or statements can be required other than those requested of national economic operators and, in any event, only those provided for under Articles 45 to 49 and, where appropriate, Article 50.

However, economic operators from other Member States may not be obliged to undergo such registration or certification in order to participate in a public contract. The contracting authorities shall recognise equivalent certificates from bodies established in other Member States. They shall also accept other equivalent means of proof.

6. Economic operators may ask at any time to be registered in an official list or for a certificate to be issued. They must be informed within a reasonably short period of time of the decision of the authority drawing up the list or of the competent certification body.

…’

13 Annex VII A to that directive, entitled ‘Information to be included in public contract notices’, states in point 17, under the heading ‘Contract notices’, that the contract notice must state, inter alia in open procedures, the ‘selection criteria regarding the personal situation of economic operators that may lead to their exclusion, and required information proving that they do not fall within the cases justifying exclusion[,] selection criteria and information concerning the economic operators’ personal situation, information and any necessary formalities for assessment of the minimum economic and technical standards required of the economic operator [and] minimum level(s) of standards possibly required’.

Regulation (EC) No 852/2004

14 Recitals 1 and 8 of Regulation (EC) No 852/2004 of the European Parliament and of the Council of 29 April 2004 on the hygiene of foodstuffs (OJ 2004 L 139, p. 1), as amended by Regulation (EC) No 219/2009 of the European Parliament and of the Council of 11 March 2009 (OJ 2009 L 87, p. 109) ('Regulation No 852/2004'), state:

'(1) The pursuit of a high level of protection of human life and health is one of the fundamental objectives of food law, as laid down in Regulation (EC) No 178/2002 [of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety (OJ 2002 L 31, p. 1)]. That Regulation also lays down other common principles and definitions for national and Community food law, including the aim of achieving free movement of food within the Community.

…

(8) An integrated approach is necessary to ensure food safety from the place of primary production up to and including placing on the market or export. Every food business operator along the food chain should ensure that food safety is not compromised.'

15 Article 1 of Regulation No 852/2004, entitled 'Scope', provides in paragraph 1:

'This Regulation lays down general rules for food business operators on the hygiene of foodstuffs, taking particular account of the following principles:

(a) primary responsibility for food safety rests with the food business operator;

(b) it is necessary to ensure food safety throughout the food chain, starting with primary production;

…

This Regulation shall apply to all stages of production, processing and distribution of food and to exports, and without prejudice to more specific requirements relating to food hygiene.'

16 Article 3 of that regulation, entitled 'General obligation', provides:

'Food business operators shall ensure that all stages of production, processing and distribution of food under their control satisfy the relevant hygiene requirements laid down in this Regulation.'

17 Article 6 of Regulation No 852/2004, entitled 'Official controls, registration and approval', provides:

'1. Food business operators shall cooperate with the competent authorities in accordance with other applicable Community legislation or, if it does not exist, with national law.

2. In particular, every food business operator shall notify the appropriate competent authority, in the manner that the latter requires, of each establishment under its control that carries out any of

the stages of production, processing and distribution of food, with a view to the registration of each such establishment.

Food business operators shall also ensure that the competent authority always has up-to-date information on establishments, including by notifying any significant change in activities and any closure of an existing establishment.

3. However, food business operators shall ensure that establishments are approved by the competent authority, following at least one on-site visit, when approval is required:

(a) under the national law of the Member State in which the establishment is located;

(b) under Regulation (EC) No 853/2004 [of the European Parliament and of the Council of 29 April 2004 laying down specific hygiene rules for food of animal origin (OJ 2004 L 139, p. 55)],

or

(c) by a decision adopted by the Commission. That measure, designed to amend non-essential elements of this Regulation, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 14(3).

Any Member State requiring the approval of certain establishments located on its territory under national law, as provided for in subparagraph (a), shall inform the Commission and other Member States of the relevant national rules.'

Estonian law

Law on public procurement

18 Under the title 'General principles governing the award of public contracts', Article 3 of the Riigihangete seadus (Law on public procurement), in the version applicable to the dispute in the main proceedings (RT I 2016, 20; 'the Law on public procurement'), provides:

'When awarding public contracts, the contracting authority shall comply with the following principles:

(1) the contracting authority shall use the financial means in a manner that is efficient and consistent with the aim pursued and shall attain the objective of the public contract in question at a reasonable price, ensuring, in the event of competition, the best possible price and quality by comparing the various tenders;

(2) the contracting authority shall ensure the transparency of the procedure for the award of the public contract and the possibility of reviewing it;

(3) all persons who have their domicile or registered office in Estonia, another Member State of the European Union, another Member State of the European Economic Area or in a State that has acceded to the [Agreement on Government Procurement (OJ 1996 C 256, p. 2) in Annex 4 to the Agreement establishing the World Trade Organisation (WTO) (OJ 1994

L 336, p. 3)], shall be treated equally and without discrimination by the contracting authority, and the contracting authority shall ensure that all limitations and criteria imposed on persons are proportionate, relevant and well founded in relation to the objective of the public contract;

(4) when awarding public contracts, the contracting authority shall ensure the effective use of existing competition and, in that context, the participation of a legal person governed by public law or a person governed by private law using public resources in the procedure for the award of a public contract must not distort competition through the use of public resources;

(5) the contracting authority shall avoid conflicts of interest that adversely affect competition;

(6) the contracting authority shall, where possible, give priority to environmentally friendly solutions.'

19 Article 39 of the Law on public procurement, entitled 'Verification of the qualifications of the tenderer or candidate', provides in paragraph 1:

'The contracting authority shall examine whether the economic and financial standing and the technical and professional ability of the tenderer or candidate meet the conditions relating to qualification set out in the tender notice. The conditions relating to qualification must be sufficient to establish the tenderer or candidate's suitability to perform the public contract and must also be relevant and proportionate in the light of the nature, quantity and objective of the goods, services or works covered by the public contract.'

20 Article 41 of that law, which deals with the 'technical and professional ability of tenderers or candidates', provides in paragraph 3:

'Where the legislature lays down specific conditions for an activity which must be carried out under a public contract, the contracting authority shall indicate in the tender notice the specific conditions which must be met, in addition to the operating licences and registration certificates required for qualification of the tenderer or candidate. In order to verify compliance with the specific conditions laid down in the statutory provisions, the contracting authority shall stipulate in the tender notice that the tenderer or candidate must furnish proof that it holds an operating licence or registration certificate or that it fulfils any other specific condition, or that the tenderer must prove that it is a member of a competent organisation in accordance with the legislation of its State of establishment, unless the contracting authority is able to obtain that proof, without any further expenditure, by consulting the public data on a database. If the tenderer or candidate does not hold an operating licence or registration certificate, or is not a member of the relevant organisation in accordance with the legislation of its State of establishment, the contracting authority shall exclude it.'

Law on foodstuffs

21 Under the title 'Obligation to hold a licence', Article 8 of the Toiduseadus (Law on foodstuffs), in the version applicable to the dispute in the main proceedings (RT I 1999, 30, 415; 'the Law on foodstuffs'), provides:

'1. The economic operator shall hold an operating licence for activities in the food sector in the following establishments:

(1) an establishment for the purposes of Article 6(3)(b) and (c) of Regulation [No 852/2004];

(2) an establishment in which operations relating to primary products of animal origin do not involve any alteration of the form or original characteristics of the products, unless the establishment concerned is one which deals with the primary production of those products and in which the producer carries out associated operations within the meaning of Regulation [No 852/2004];

(3) an establishment in which operations relating to primary products not of animal origin involve the alteration of the form and original characteristics of the products, unless the establishment is one referred to in Annex II, Chapter III of Regulation [No 852/2004];

(4) an establishment in which the processing of foodstuffs takes place, in particular the preparation and wrapping of foodstuffs, with the exception of the wrapping of primary products not of animal origin or where the establishment is one referred to in Annex II, Chapter III of Regulation [No 852/2004];

(5) an establishment which deals with operations relating to foodstuffs of animal origin which are then distributed to another operator and are included in Annex II, Chapter III of Regulation [No 852/2004];

(6) an establishment dealing with the storage of foodstuffs which, in order to ensure food safety, must be kept at a temperature other than ambient temperature;

(7) an establishment dealing with retail trade, in particular in foodstuffs which must be stored at a temperature other than ambient temperature in order to ensure food safety, unless the establishment is one referred to in Annex II, Chapter III of Regulation [No 852/2004];

…

2. The operating licence shall entitle the economic operator to commence operations and to pursue and carry on an economic activity in the establishment or in the part of the establishment referred to in the operating licence.

3. The competent minister in the field shall establish, by regulation, a detailed list of the areas of operation and categories of foodstuff in respect of which operators must be in possession of an operating licence.'

22 Under Article 10 of the Law on foodstuffs, entitled 'Purpose of the control of the operating licence':

'An operating licence shall be granted to an economic operator if its establishment or the establishment which it uses for its activity as a food sector operator satisfy the conditions laid down in [Regulation No 852/2004 and Regulation No 853/2004, and] in other relevant provisions on foodstuffs.'

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

23 The Ministry of Social Affairs organised two open invitations to tender for public contracts for the purchase of food aid for the most disadvantaged persons, one in 2015, the other in 2017, each with the estimated value of EUR 4 million.

24 As regards the first contract, tenderers were initially required to have the approval of the Veterinaar- ja Toiduamet (Veterinary and Food Office, Estonia), since that approval was deemed necessary for the performance of that contract. However, during the procurement procedure, the tender documentation was amended in order to replace that requirement with the obligation to provide confirmation of compliance with the obligations relating to information and authorisation laid down in the Law on foodstuffs and which were necessary for the performance of that contract.

25 As regards the second contract, the contracting authority required from the outset the confirmation referred to in the preceding paragraph.

26 In the context of each of those two public contracts, framework agreements were signed with the three successful tenderers.

27 By a financial correction decision of 30 October 2018, Riigi Tugiteenuste Keskus rejected requests for payment amounting to approximately EUR 463 000. Those requests had been made in connection with the project 'Purchase and transport of foodstuffs to the place of storage', which forms part of a food aid programme of the Ministry of Social Affairs for the most disadvantaged persons.

28 In so doing, Riigi Tugiteenuste Keskus followed the position stated by the Rahandusministeerium (Ministry of Finance, Estonia) in the final audit report of 10 September 2018, which concluded that the requirement that tenderers must have an approval issued by an Estonian authority or must comply with the obligations relating to information and authorisation in Estonia was unjustifiably restrictive for tenderers established in a Member State other than the Republic of Estonia.

29 Following the dismissal of the administrative complaint that it had brought before Riigi Tugiteenuste Keskus, the Ministry of Social Affairs brought an action before the Tallinna Halduskohus (Tallinn Administrative Court, Estonia) seeking annulment of the financial correction decision of 30 October 2018.

30 In support of that action, it claimed, first, that in order to comply with Article 41(3) of the Law on public procurement, the contract notice must state, as a condition for the qualification of tenderers, the specific requirements to be met and the registration certificates and operating licences required.

31 In the present case, the performance of the public contracts at issue required the use of an intermediate warehouse in which foodstuffs could be stored or a means of transport situated in Estonia. By satisfying those conditions, the tenderer would become a food business operator and should, in accordance with Article 8 of the Law on foodstuffs and Article 6(3) of Regulation No 852/2004, fulfil the obligations relating to information and authorisation in Estonia. The contracting authority is not in fact able to accept an operating licence issued by the Member State in which the tenderer is established since, in the case of operating licences in the food sector, there is no mutual recognition between the Member States.

32 According to the Ministry of Social Affairs, the setting of qualification conditions linked to specific requirements under the Law on foodstuffs enabled the contracting authority legally to reduce the risks of improper performance of the public contracts in question. The verification of compliance with the obligations imposed by that law, concerning information and authorisation, should therefore have been carried out at the stage of qualification of tenderers, and not during the performance of those contracts. In that regard, it would have sufficed for a tenderer established in a Member State other than the Republic of Estonia to inform the Veterinary and Food Office by letter of the fact that it was going to start an activity, without it being necessary to obtain a reply from that office. At the same time as it informed that office, or subsequently, that tenderer could have initiated, if necessary, a licencing procedure. In view of the time limit set for the submission of tenders in the case of an international call for tenders, which is at least 40 days, and the period required for the licensing procedure laid down in that law, which is 30 days, a tenderer would have had sufficient time to carry out the steps associated with the licencing procedure.

33 In the second place, the first contract had already been assessed and approved twice by the auditors of the Ministry of Finance. Thus, the retroactive change in the interpretation of the public procurement rules during a third audit carried out by the same auditors is not consistent with the principles of sound administration and the protection of legitimate expectations.

34 Riigi Tugiteenuste Keskus, supported by the Ministry of Finance, contended before the Tallinna Halduskohus (Tallinn Administrative Court) that the action of the Ministry of Social Affairs should be dismissed. It argued, inter alia, that Article 46 of Directive 2004/18 only permits for a tenderer to be required to furnish proof that it holds a licence to provide services issued by the Member State in which it is established or proof that it is a member of a specific organisation in that Member State. Furthermore, it is unreasonable and contrary to the principle of equal treatment to require the tenderer to have already carried out various administrative steps in Estonia at the time of submitting the tender, even if such steps are linked to performance of the contract. Lastly, Riigi Tugiteenuste Keskus contends that there has been no infringement of the principle of the protection of legitimate expectations.

35 By decision of 22 May 2019, the Tallinna Halduskohus (Tallinn Administrative Court) dismissed the action of the Ministry of Social Affairs on the ground that the requirement that tenderers must have an approval issued by an Estonian authority or must comply with the obligations relating to information and authorisation in Estonia was disproportionate and discriminatory to tenderers established in other Member States. That court also rejected the plea alleging infringement of the principle of the protection of legitimate expectations in so far as the Ministry of Social Affairs could not, in the light of previous, non-binding audits carried out by the Ministry of Finance, be legally certain that there would be no future infringements of the rules applicable to public procurement.

36 Following the dismissal of its action, the Ministry of Social Affairs appealed to the Tallinna Ringkonnakohus (Tallinn Court of Appeal, Estonia).

37 According to the Tallinna Ringkonnakohus (Tallinn Court of Appeal), since the conditions for the issue of the confirmation or approval by the competent authority are not fully harmonised under Regulation No 852/2004, an economic operator cannot rely, in order to commence an activity in a Member State other than its State of origin, on an approval issued in the latter, but must rather obtain the approval required in the former State.

38 Furthermore, allowing a tenderer to qualify for a public contract solely on the basis of its undertaking to apply for an operating licence or registration certificate could jeopardise the performance of the contract concerned if that tenderer does not fulfil that obligation or is not in a position to carry on its activity in accordance with the conditions for obtaining that licence or registration certificate.

39 While noting that the requirement for an operating licence or registration certificate in Estonia is disproportionate in relation to tenderers established in another Member State, the referring court observes that the interpretation of Article 46 of Directive 2004/18 is not readily apparent, particularly as the Court has not yet had an opportunity to interpret that provision. Furthermore, the requirements laid down in the interests of food safety are justified as a condition for the performance of the public contracts at issue and, accordingly, the dispute in the main proceedings concerns only the question of when those requirements must be met, either at the time of submitting the tender or at the time of performance of the contract.

40 In those circumstances, the Tallinna Ringkonnakohus (Court of Appeal, Tallinn), stayed the proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

‘(1) Are Articles 2 and 46 of [Directive 2004/18] to be interpreted as precluding national legislation – such as Paragraph 41(3) of [the Law on public procurement] – pursuant to which, if specific requirements for the activities to be carried out under a public contract are laid down by law, the contracting authority must specify in the tender notice which registrations or activity licences are required to qualify the tenderer, must require the tenderer to submit evidence of the activity licence or registration for the purpose of verifying compliance with the special statutory requirements in the tender notice, and must refuse the tenderer as unqualified if the latter does not possess the relevant activity licence or registration?

(2) Read together, are Articles 2 and 46 of [Directive 2004/18] to be interpreted as precluding the contracting authority, in the case of a food aid procurement contract that exceeds the international threshold, from setting a selection criterion for the tenderers according to which all tenderers, irrespective of where they were previously established, must already hold an activity licence or be registered in the country of the food aid operations at the time of submission of the tenders, even if the tenderer has not previously been established in that Member State?

(3) If the preceding questions are answered in the affirmative:
(a) Are Articles 2 and 46 of [Directive 2004/18] to be regarded as provisions that are so unambiguous that the principle of the protection of legitimate expectations cannot be invoked against them?

(b) Are Articles 2 and 46 of [Directive 2004/18] to be interpreted as meaning that a situation in which the contracting authority in a public tender for food aid requires, pursuant to the national law on foodstuffs, that the tenderers already hold an activity licence at the time of submission of the tender may be regarded as constituting a manifest infringement of the rules in force, as negligence or as an irregularity precluding reliance on the principle of the protection of legitimate expectations?'

Consideration of the questions referred

The first and second questions

41 By its first and second questions, which it is appropriate to examine together, the referring court asks, in essence, whether Articles 2 and 46 of Directive 2004/18 must be interpreted as precluding national legislation under which the contracting authority must require, in a contract notice and as a qualitative selection criterion, that tenderers furnish proof, at the time of submitting their tender, that they hold the registration certificate or approval required under the legislation applicable to the activity which is the subject of the public contract in question and that it be issued by the competent authority of the Member State in which the contract is to be performed, even where they already hold a similar registration certificate or approval in the Member State in which they are established.

42 As a preliminary point, it should be noted that the second public contract at issue in the main proceedings was awarded in 2017, when Directive 2004/18 was no longer in force, since it had been repealed with effect from 18 April 2016 by 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 95, p. 65) and the time limit for transposition of the provisions of Directive 2014/24 also expired on 18 April 2016.

43 However, in the absence of any clarifications from the referring court regarding the date on which the contracting authority chose the type of procedure it intended to follow and definitively decided whether or not there was an obligation to conduct a prior call for competition for the award of the public contract in question, it cannot be determined whether the provisions of Directive 2014/24 are inapplicable on the ground that the period for transposition of that directive expired after that date (see, to that effect, judgments of 27 October 2016, *Hörmann Reisen*, C-292/15, EU:C:2016:817, paragraphs 31 and 32, and of 28 February 2018, *MA.T.I. SUD and Duemme SGR*, C-523/16 and C-536/16, EU:C:2018:122, paragraph 36), it being noted that the content of Articles 2 and 46 of Directive 2004/18 was reproduced in Directive 2014/24.

44 In addition, it should be noted that the obligation for tenderers to hold the registration certificate or approval required by the legislation applicable to the activity which is the subject of the public contract at issue must be understood as a qualitative selection criterion and not as a condition for the performance of the contract for the purposes of Article 26 of Directive 2004/18.

45 First, that requirement corresponds to the option given to the contracting authority under Article 46 of that directive to ask an economic operator to prove its suitability to pursue the professional activity concerned by a public procurement procedure. That requirement thus sets out a criterion for qualitative selection of tenderers intended to enable contracting authorities to assess the suitability of tenderers to perform the public contract concerned.

46 Secondly, the obligation for an economic operator to register or obtain approval in the Member State in which the public contract in question is to be performed presupposes, of course, that the successful tenderer will be required to have an establishment in that State. Conversely, it does not provide any information as to the manner in which that contract is to be performed. Therefore, the requirement to hold a registration certificate or approval cannot be regarded as a special condition concerning the performance of that contract.

47 It is therefore necessary to determine whether Article 46 of Directive 2004/18 precludes a contracting authority from requiring, as a criterion for qualitative selection of tenderers, that tenderers hold a registration certificate and/or approval in the Member State in which the public contract in question is to be performed, even where a tenderer already has a registration certificate and/or approval in the Member State in which it is established.

48 In the first place, as regards Directive 2004/18, it follows from Article 46, read in conjunction with recital 42 thereof, that the principle of mutual recognition of qualifications prevails at the stage of the selection of tenderers. The first paragraph of Article 46 of that directive thus provides that, where an economic operator wishing to take part in a public procurement procedure is asked to prove that it is enrolled on one of the professional or trade registers or to provide a declaration on oath or a certificate, it may do so in accordance with the conditions laid down in the Member State in which it is established. The second paragraph of that article accordingly provides that in procedures for the award of public service contracts, in so far as candidates or tenderers have to possess a particular authorisation or to be members of a particular organisation in order to be able to perform the service concerned in their State of origin, the contracting authority may require them to prove that they hold such authorisation or membership.

49 It follows that a tenderer must be able to prove its suitability to perform a public contract by means of documents, such as a certificate or proof of enrolment on one of the professional or trade registers, issued by the competent authorities of the Member State in which it is established.

50 That interpretation of Article 46 of Directive 2004/18 is borne out by other provisions of that directive. Thus, Article 48(2)(d) and (2)(j)(ii) of that directive refers to a number of situations in which an economic operator may demonstrate its technical and/or professional abilities by sending to the contracting authority of the Member State of performance of a public contract documents issued by the competent authorities of another Member State. The same applies to Article 49 of that directive as regards compliance with quality assurance standards.

51 It also follows from Article 52(3) of Directive 2004/18 that certified registration on official lists by the competent bodies of a Member State or a certificate issued by the certification body of that Member State constitutes a presumption of suitability for the purposes of the contracting authorities of other Member States, in relation inter alia to Article 46 of that directive. It is also apparent from Article 52(4) of that directive that information which may be deduced from registration on official lists or certification may not be questioned without justification. Lastly, in accordance with the second subparagraph of Article 52(5) of that directive, the contracting authorities of a Member State must recognise equivalent certificates from bodies established in other Member States.

52 It should also be noted that infringement of Article 46 of Directive 2004/18 necessarily entails infringement of the principles of proportionality and equal treatment of tenderers, which are enshrined in Article 2 of that directive, since the requirement that tenderers must have the

approval of an Estonian authority or must fulfil obligations relating to information and authorisation in Estonia is discriminatory and does not appear to be justified as regards tenderers established in other Member States.

53 In the present case, there is nothing to suggest that the public contracts at issue in the main proceedings could not be performed from the Member State in which the tenderer is established or another Member State. Thus, it is for the tenderer to decide, on the basis of economic calculations, whether it wishes to take on an establishment in the Member State in which that contract is to be performed.

54 Moreover, the Court has already held that for a Member State to make the provision of services by an undertaking established in another Member State subject to the possession of a business licence in the first State would have the result of depriving of all effectiveness Article 56 TFEU, the purpose of which is precisely to abolish restrictions on the freedom to provide services of persons not established in the Member State in which the service is to be provided (see, by analogy, judgment of 10 February 1982, *Transporoute et travaux*, 76/81, EU:C:1982:49, paragraph 14).

55 It follows that Article 46 of Directive 2004/18 must be interpreted as precluding a contracting authority from requiring, as a qualitative selection criterion, a registration certificate and/or approval in the Member State of performance of public contracts where the tenderer already has similar approval in the Member State in which it is established.

56 In the second place, the order for reference nevertheless suggests that the obligation for tenderers to hold a registration certificate or approval in Estonia, even where they already have similar approval in the Member State in which they are established, follows from the Law on foodstuffs, which is intended to give effect to the provisions of Regulation No 852/2004 pursuant to the numerous references to that regulation contained therein. In those circumstances, both national and EU legislation on foodstuffs might constitute a special law and, on that basis, be allowed to derogate from the rules governing the award of public contracts.

57 It is therefore necessary to determine whether the interpretation of Article 46 of Directive 2004/18 set out in paragraph 55 above conflicts with Regulation No 852/2004, in which case the Court would be required to reconcile the conflicting requirements arising from that regulation and that directive.

58 In that regard, it is apparent, as stated in recital 1 thereof, that the objective of Regulation No 852/2004 is to achieve a high level of protection of human life and health, but that it also seeks to achieve the free movement of foodstuffs within the European Union.

59 That objective of the free movement of foodstuffs would be affected if food business operators were required to register or obtain an operating licence in each Member State in which they transport or store their foodstuffs.

60 As is apparent from Article 3 of Regulation No 852/2004, read in conjunction with recital 8 thereof, the EU legislature promotes an integrated approach to ensure food safety from the place of primary production up to and including the placing on the market or export and, to that end, it is for each food business operator along the food chain to ensure that food safety is not compromised. Similarly, Article 1(1)(a) of that regulation emphasises that the primary responsibility for food safety rests with the food business operator.

61 That said, in order to ensure food safety throughout the food chain, starting with primary production, as required by Article 1(1)(b) of that regulation, Article 6 thereof provides for official controls, registration and approval of food business establishments.

62 Article 6 of Regulation No 852/2004 does not, however, preclude a disjunction between, on the one hand, the competence to register a food business establishment or to grant approval to such an establishment and, on the other hand, the competence to supervise the activity thus authorised. Thus, in circumstances such as those in the main proceedings, a registration certificate or approval obtained in one Member State must enable its holder to distribute foodstuffs in another Member State whose authorities are in that case nevertheless free to monitor that distribution and to ensure compliance with the provisions of that regulation.

63 It follows that the fact that an economic operator holds a registration certificate or approval issued by the Member State in which it is established constitutes, in the context of a public procurement procedure taking place in another Member State, a presumption of its ability to ensure in the latter State the activity of supplying and distributing foodstuffs and, therefore, of performing the contract in question.

64 As the Commission stated in response to a written question from the Court, an operator may therefore rely on a registration certificate or approval issued by the Member State of the food business establishment from which it dispatched its food. This is because the Member States are required to subject all establishments to official controls, to apply procedures to ensure that the controls are carried out efficiently and to ensure cooperation between the competent authorities of the Member States. Therefore, in a situation such as that at issue in the main proceedings, a food business operator that has an establishment in a Member State other than the Republic of Estonia which is registered or approved in that State may deliver foodstuffs in Estonia without having to obtain a special additional authorisation.

65 In those circumstances, it should be noted, as observed by the Commission, that the obligation to have a warehouse situated on Estonian territory follows from a specific requirement of the procurement procedure at issue in the main proceedings and not from Regulation No 852/2004 itself.

66 In the light of the foregoing considerations, the answer to the first and second questions is that Articles 2 and 46 of Directive 2004/18 must be interpreted as precluding national legislation under which the contracting authority must require, in a contract notice and as a qualitative selection criterion, that tenderers furnish proof, at the time of submitting the tender, that they hold the registration certificate or approval required under the legislation applicable to the activity which is the subject of the public contract in question and that it be issued by the competent authority of the Member State in which the contract is to be performed, even where they already hold a similar registration certificate or approval in the Member State in which they are established.

The third question

67 By its third question, the referring court asks, in essence, whether the principle of the protection of legitimate expectations must be interpreted as meaning that it may be relied on by a contracting authority which, in the context of a public procurement procedure, has, in order to comply with

the national rules on foodstuffs, required tenderers to have, at the time of submitting their tender, a registration certificate or approval issued by the competent authority of the Member State in which the contract is to be performed.

68 It is apparent from the order for reference that, in the dispute in the main proceedings, the Ministry of Social Affairs considers that, if it were to be criticised for having infringed Articles 2 and 46 of Directive 2004/18, that infringement of the EU public procurement rules should remain ineffective by virtue of the principle of the protection of legitimate expectations since, prior to the adoption of the financial correction decision of 30 October 2018, the auditors of the Ministry of Finance approved, on two occasions, the requirement for all tenderers, including those established in a Member State other than the Republic of Estonia, to submit, at the time of submitting their tender, an operating licence issued by the Veterinary and Food Office.

69 According to the Court's settled case-law, the right to rely on the principle of the protection of legitimate expectations extends only to a person in a situation in which an administrative authority has caused that person to entertain expectations which are justified by precise unconditional and consistent assurances provided to him or her and originating from authorised, reliable sources (see, to that effect, judgments of 7 August 2018, *Ministru kabinets*, C-120/17, EU:C:2018:638, paragraph 50 and the case-law cited; of 5 March 2019, *Eesti Pagar*, C-349/17, EU:C:2019:172, paragraph 97; and of 19 December 2019, *GRDF*, C-236/18, EU:C:2019:1120, paragraph 46).

70 Nevertheless, the concept that a State is to be viewed as a single entity, which prevails both in public international law and in EU law (see, to that effect, judgment of 5 March 1996, *Brasserie du pêcheur and Factortame*, C-46/93 and C-48/93, EU:C:1996:79, paragraph 34), precludes, in principle, a national authority from relying on the principle of EU law of legitimate expectations in the context of a dispute between that authority and another component of that State.

71 Thus, in the context of the dispute in the main proceedings, the fact that the Ministry of Finance has already approved a practice contrary to EU law may not be relied on by the Ministry of Social Affairs in order to allow that practice to continue or, at the very least, neutralise its past effects.

72 The answer to the third question must therefore be that the principle of the protection of legitimate expectations must be interpreted as meaning that it may not be relied on by a contracting authority which, in the context of a public procurement procedure, has, in order to comply with the national rules on foodstuffs, required tenderers to have, at the time of submitting their tender, a registration certificate or approval issued by the competent authority of the Member State in which the contract is to be performed.

Costs

73 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 (Fourth Chamber) hereby rules:

1. **Articles 2 and 46 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 precluding national legislation under which the contracting authority must require, in a contract notice and as a qualitative selection criterion, that tenderers furnish proof, at the time of submitting the tender, that they hold the registration certificate or approval required under the legislation applicable to the activity which is the subject of the public contract in question and that it be issued by the competent authority of the Member State in which the contract is to be performed, even where they already hold a similar registration certificate or approval in the Member State in which they are established.**

2. **The principle of the protection of legitimate expectations must be interpreted as meaning that it may not be relied on by a contracting authority which, in the context of a public procurement procedure, has, in order to comply with the national rules on foodstuffs, required tenderers to have, at the time of submitting their tender, a registration certificate or approval issued by the competent authority of the Member State in which the contract is to be performed.**

[Signatures]