Reports of Cases

JUDGMENT OF THE COURT (Ninth Chamber)

13 July 2017*

(Reference for a preliminary ruling — Public procurement — Transport — Definition of "exploitation of a geographical area for the purpose of the provisions of airports or other terminal facilities to carriers by air" — Directives 2004/17/EC and 96/67/EC — National legislation which does not require a tendering procedure to be conducted prior to the allocation of areas within an airport)

In Case C-701/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunale amministrativo regionale per la Lombardia (Regional Administrative Court, Lombardy, Italy), made by decision of 4 November 2015, received at the Court on 31 December 2015, in the proceedings

Malpensa Logistica Europa SpA

v

Società Esercizi Aeroportuali SpA (SEA),

intervening party:

Beta-Trans SpA,

THE COURT (Ninth Chamber),

composed of E. Juhász (Rapporteur), President of the Chamber, C. Vajda and K. Jürimäe, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: R. Schiano, Administrator,

having regard to the written procedure and further to the hearing on 15 February 2017,

after considering the observations submitted on behalf of:

— Malpensa Logistica Europa SpA, by G. Greppi, P. Ferraris, G. Razeto and A. Bazzi, avvocati,

— Società Esercizi Aeroportuali SpA (SEA), by R. Bertani, E. Raffaelli and A. Pavan, avvocati,

— Beta—Trans SpA, by C. Mele and M. Giordano, avvocati,

— the European Commission, by C. Zadra, W. Mölls and A. Tokár, acting as Agents,

* Language of the case: Italian.

after hearing the Opinion of the Advocate General at the sitting on 3 May 2017,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 7 of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1).

2 The request has been made in proceedings between Malpensa Logistica Europa SpA and Società Esercizi Aeroportuali SpA (SEA), the manager of Milan's Malpensa Airport (Italy) ('Malpensa Airport'), concerning the allocation of areas for the provision of groundhandling services within that airport without any prior tendering procedure.

Legal context

European Union law

Directive 96/67/EC

3 Council Directive 96/67/EC of 15 October 1996 on access to the groundhandling market at Community airports (OJ 1996 L 272, p. 36), applies, as stated in Article 1(1) thereof, to 'any airport located in the territory of a Member State, subject to the provisions of the Treaty, and open to commercial traffic in the following circumstances'.

4 Article 6 of Directive 96/67, headed 'Groundhandling for third parties', provides in paragraphs 1 and 2 thereof:

'1. Member States shall take the necessary measures … to ensure free access by suppliers of groundhandling services to the market for the provision of groundhandling services to third parties.

…

2. Member States may limit the number of suppliers authorised to provide the following categories of groundhandling services:

— baggage handling,

— ramp handling,

— fuel and oil handling,

— freight and mail handling as regards the physical handling of freight and mail, whether incoming, outgoing or being transferred, between the air terminal and the aircraft.

They may not, however, limit this number to fewer than two for each category of groundhandling service.'

5 Article 9 of Directive 96/67, under the heading ‘Exemptions’, provides in paragraph 1 thereof as follows:

‘Where at an airport, specific constraints of available space or capacity, arising in particular from congestion and area utilization rate, make it impossible to open up the market and/or implement self-handling to the degree provided for in this Directive, the Member State in question may decide:

(a) to limit the number of suppliers …’

6 Article 11 of Directive 96/67, headed ‘Selection of suppliers’, states in paragraph 1 thereof:

‘Member States shall take the necessary measures for the organization of a selection procedure for suppliers authorized to provide groundhandling services at an airport where their number is limited in the cases provided for in Article 6(2) or Article 9. …’

7 Article 16 of Directive 96/67, headed ‘Access to installations’, provides, in paragraph 2 thereof:

‘The space available for groundhandling at an airport must be divided among the various suppliers of groundhandling services and self-handling airport users, including new entrants in the field, to the extent necessary for the exercise of their rights and to allow effective and fair competition, on the basis of the relevant, objective, transparent and non-discriminatory rules and criteria.’

Directive 2004/17

8 Article 1 of Directive 2004/17, headed ‘Definitions’, provides as follows:

‘1. For the purposes of this Directive, the definitions set out in this Article shall apply.

2.

(a) “Supply, works and service contracts” are contracts for pecuniary interest concluded in writing between one or more of the contracting entities referred to in Article 2(2), and one or more contractors, suppliers, or service providers.…

(d) “Service contracts” are contracts other than works or supply contracts having as their object the provision of services referred to in Annex XVII.

…

3. …

(b) A “service concession” is a contract of the same type as a service contract except for the fact that the consideration for the provision of services consists either solely in the right to exploit the service or in that right together with payment.’

9 Article 2 of that directive, entitled ‘Contracting entities’, provides in paragraph 2(a) thereof:

‘This Directive shall apply to contracting entities:

(a) which are contracting authorities or public undertakings and which pursue one of the activities referred to in Articles 3 to 7.’

10 Article 7 of Directive 2004/17, headed ‘Exploration for, or extraction of, oil, gas, coal or other solid fuels, as well as ports and airports’, is worded as follows:

‘This Directive shall apply to activities relating to the exploitation of a geographical area for the purpose of:

…

(b) the provision of airports and maritime or inland ports or other terminal facilities to carriers by air, sea or inland waterway.’

11 Article 18 of that directive, headed ‘Works and service concessions’, states as follows:

‘This Directive shall not apply to works and service concessions which are awarded by contracting entities carrying out one or more of the activities referred to in Articles 3 to 7, where those concessions are awarded for carrying out those activities.’

Italian law

12 Directive 96/67 was transposed into Italian law by decreto legislativo n. 18 — Attuazione della direttiva 96/67/CE relativa al libero accesso al mercato dei servizi di assistenza a terra negli aeroporti della Comunità (Legislative Decree No 18 implementing Directive 96/67/EC on access to the groundhandling market at Community airports) of 13 January 1999 (GURI No 28, 4 February 1999) (‘Legislative Decree No 18/1999’). Articles 4 and 11 of that decree transpose, respectively, Articles 16 and 11 of Directive 96/67.

13 Article 4 of Legislative Decree No 18/1999 grants free access to the groundhandling market to any service provider, on the basis of the criteria set out in Article 13 of the legislative decree, at an airport in which the annual volume of traffic is not less than 3 million passenger movements or 75 000 tonnes of freight or which has recorded traffic of not less than 2 million passenger movements or 50 000 tonnes of freight during the six-month period prior to 1 April or 1 October of the previous year. Article 4(2) of Legislative Decree No 18/1999 empowers the Ente Nazionale per l’aviazione civile (ENAC) (National Civil Aviation Authority) to limit the number of suppliers on the ground that there are specific constraints of space, available capacity or safety, and Article 12 thereof also imposes restrictions on access to the market.

14 Pursuant to Article 11 of Legislative Decree No 18/1999, an invitation for tenders must be published, which is open to all interested suppliers, solely for the purpose of identifying suppliers of groundhandling services whose access to the market is subject to limitations or derogations.

15 Directive 2004/17 was transposed into Italian law by Articles 207 et seq. of decreto legislative n. 163 — Codice dei contratti pubblici relativi a lavori, servizi e forniture in attuazione delle direttive 2004/17/CE e 2004/18/CE (Legislative Decree No 163 establishing the Code on public works contracts, public service contracts and public supply contracts and transposing Directives 2004/17/EC and 2004/18/EC) of 12 April 2006 (GURI No 100, 2 May 2006). Article 213 of that legislative decree transposed Article 7 of Directive 2004/17.

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

16 SEA, as the managing body responsible for Malpensa airport, awarded a hangar at that airport, with an area of approximately 1 000 square metres, to Beta-Trans for the provision of groundhandling services.

17 By application lodged on 18 April 2015 before the Tribunale amministrativo regionale per la Lombardia (Regional Administrative Court, Lombardy), Malpensa Logistica Europa, a concession company for airport areas intended for the performance of groundhandling activities at Malpensa Airport, sought the suspension and annulment of the measure granting that award.

18 According to Malpensa Logistica Europa, that measure is vitiated by unlawfulness because it was adopted without any prior tendering procedure. In particular, that company argues that it had insufficient space at its disposal at the Malpensa Airport site to pursue its groundhandling activities. Accordingly, it was entitled to entertain the same expectations as Beta-Trans as regards the new areas to be allocated, and the decision by which SEA awarded the area in question, which was originally intended to be used as a hangar, directly to Beta-Trans, without any tendering procedure, caused it to suffer loss.

19 SEA and Beta-Trans have argued before the referring court that the contested area was made available to Beta-Trans only temporarily, in order to enable it, as a new operator, to begin its activity as supplier of groundhandling services at Malpensa Airport pending completion of the fitting out of the areas allocated to Beta-Trans at the conclusion of a public tendering procedure in which Malpensa Logistica Europa had also participated. Moreover, according to SEA and Beta-Trans, Malpensa Logistica Europa already had at its disposal a storage area of approximately 18 000 square metres, as well as two covered areas of 2 700 and 3 227 square metres, respectively, for the temporary storage of cargo where it could be protected in bad weather.

20 The referring court stated that two national legal provisions, transposing Directive 2004/17 and Directive 96/67 respectively, would appear to be applicable, *in abstracto*, to the facts of the case.

21 With regard to the applicability of Directive 2004/17, the referring court considers that SEA, as manager of Malpensa Airport, is a contracting authority that is required to comply with public procurement rules in special sectors. Moreover, the activity pursued by SEA falls within the category of activities relating to the exploitation of a geographical area for the purpose of the provision of airports to air carriers, in accordance with Article 7 of Directive 2004/17. That court explains that, according to national case-law, the exploitation of airport areas (geographical areas), including, therefore, internal areas, in connection with the activities usually performed by air carriers falls within the material scope of the rules governing special sectors.

22 The referring court concludes from this that the provision of groundhandling services in airports, by the exploitation of geographical areas, also falls within the material scope of those rules

23 However, according to the national court, the applicability of Directive 2004/17 might be at odds with the specific provisions of Legislative Decree No 18/1999, which transposed Directive 96/67. On the basis of that legislation, the requirement to launch a prior public tendering procedure is applicable only to the selection of suppliers falling within categories of groundhandling services whose access to the market is subject to restrictions and derogations.

24 The referring court states in that regard that, according to the information available to it, those restrictions and derogations are not currently in force in so far as Malpensa Airport is concerned. As a consequence, it is necessary, according to that court, to accept the applicability of Article 4(1) of Legislative Decree No 18/1999, which grants free access by suppliers to the market for the provision of groundhandling services without the need for any prior public tendering procedure, provided that the space available at the airport is divided among the various suppliers of groundhandling services and self-handling airport users ‘to the extent necessary for the exercise of their rights and to allow effective and fair competition, on the basis of the relevant, objective, transparent and non-discriminatory rules and criteria’, as required pursuant to Article 16(2) of Directive 96/67.

25 In the light of the foregoing considerations, the Tribunale amministrativo regionale per la Lombardia (Regional Administrative Court, Lombardy) has decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'Does Article 7 of Directive 2004/17, which requires the application of the EU rules governing the award of public contracts to activities relating to the exploitation of a geographical area for the purpose of the provision of airports to air carriers, as defined in the national case-law referred to in paragraphs 6.4 and 6.5 [of the order for reference], preclude national provisions, such as those set out in Articles 4 and 11 of Legislative Decree No 18/1999, which do not require a prior public selection procedure to be conducted for every allocation, including temporary allocations, of areas within airports for the purpose of such activities?'

Consideration of the question referred

26 By its question, the referring court seeks to ascertain, in essence, whether Article 7 of Directive 2004/17 must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which does not require a selection procedure to be conducted prior to every allocation, including temporary allocations, of areas within airports to be used for the provision of groundhandling services.

27 Article 7 of Directive 2004/17 provides that the activities to which the directive applies include activities relating to the exploitation of a geographical area for the purpose of providing airports to air carriers.

28 However, it is necessary to consider whether the contract for the allocation of airport areas at issue in the main proceedings falls within the scope of Directive 2004/17.

29 As observed by, inter alia, the Commission, the contract at issue in the main proceedings, as described by the referring court, cannot be classified as a 'services contract', as the managing body responsible for Malpensa Airport did not acquire a service provided by the supplier in return for remuneration.

30 Moreover, it is not necessary to consider whether that contract may be classified as a 'concession', given that, under Article 18 of Directive 2004/17, services concessions relating to the exploitation of a geographical area for the purpose of providing airports to air carriers fall, in any event, outside the scope of that directive.

31 As a consequence, in the light of the information provided by the referring court, it does not appear that the award at issue in the main proceedings falls within the scope of Directive 2004/17.

32 On the other hand, a body responsible for the management of an airport, such as SEA, is subject to the provisions of Directive 96/67.

33 It is apparent from Article 16(2) of Directive 96/67 that the managing body concerned must comply with the requirements laid down in that provision, under which the space available for groundhandling at an airport must be divided among the various suppliers of groundhandling services and self-handling airport users, including new entrants in the field, to the extent necessary for the exercise of their rights and to allow effective and fair competition, on the basis of the relevant, objective, transparent and non-discriminatory rules and criteria. That body is not obliged, however, to organise a prior tendering procedure.

34 It is therefore for the referring court to verify whether, in the case before it, the requirements set out in the above paragraph have been met.

35 In the light of the foregoing considerations, the answer to the question referred is that Article 7 of Directive 2004/17 is to be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which does not require a public selection procedure to be conducted prior to the allocation, including a temporary allocation, of areas within airports to be used for the provision of groundhandling services for which no remuneration is to be paid by the manager of the airport.

Costs

36 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 (Ninth Chamber) hereby rules:

Article 7 of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors is to be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which does not require a public selection procedure to be conducted prior to the allocation, including a temporary allocation, of areas within airports to be used for the provision of groundhandling services for which no remuneration is to be paid by the manager of the airport.

[Signatures]