Reports of Cases

OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 21 January 2016 [1]

Case C-27/15

Pippo Pizzo and Others
v
CRGT srl
(Request for a preliminary ruling

from the Consiglio di Giustizia Amministrativa per la Regione siciliana (Italy))

(Public contracts — Directive 2004/18/EC — Participation in a tendering procedure — Whether the capacities of other undertakings may be relied upon in order to satisfy the necessary conditions — Failure to pay a fee not explicitly provided for — Exclusion of tenderer)

1. The present reference for a preliminary ruling provides the Court with a fresh opportunity of developing its case-law on procedures for the award of public contracts, in particular, its case-law on Directive 2004/18/EC. [2]

2. On the one hand, this case raises again the question whether a tenderer may rely upon the capacities of third parties in order to satisfy the conditions for participation in a procurement procedure, an issue which can relatively simply be resolved in the light of the Court's case-law.

3. On the other hand, and this is a more complex issue, the referring court asks whether it is permissible for certain conditions of admissibility governing participation in a tendering procedure not to be expressly included in the tender notice or the contract documents, but instead to be inferred from generally applicable national provisions.

4. In relation to that second issue, I shall propose to the Court a nuanced reading of its case-law on the need for the contract documents to set out explicitly all the conditions of the tender. I shall do so by relying upon the logic I consider to be inherent in the notion of a 'reasonably informed tenderer exercising ordinary care' as a criterion determining the spirit of that case-law.

1 — Original language: Spanish.

2 — Directive of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

I – **Legislative framework**

A – *EU law*

1. Directive 2004/18

5. Article 2 of Directive 2004/18 provides that '[c]ontracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way.'

6. Article 47 of the directive states:

'1. Proof of the economic operator's economic and financial standing may, as a general rule, be furnished by one or more of the following references:

(a) appropriate statements from banks or, where appropriate, evidence of professional risk indemnity insurance;

(b) the presentation of balance-sheets or extracts from the balance-sheets, where publication of the balance-sheet is required under the law of the country in which the economic operator is established;

(c) a statement of the undertaking's overall turnover and, where appropriate, of turnover in the area covered by the contract …

2. An economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. It must in that case prove to the contracting authority that it will have at its disposal the resources necessary, for example, by producing an undertaking by those entities to that effect.

…'

7. According to Article 48 of Directive 2004/18:

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

…

3. An economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. It must in that case prove to the contracting authority that it will have at its disposal the resources necessary for the execution of the contract, for example, by producing an undertaking by those entities to place the necessary resources at the disposal of the economic operator.

…'

2. Directive 2014/24/EU[3]

8. Pursuant to Article 63 of Directive 2014/24:

'1. With regard to criteria relating to economic and financial standing … and to criteria relating to technical and professional ability … an economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. … Where an economic operator wants to rely on the capacities of other entities, it shall prove to the contracting authority that it will have at its disposal the resources necessary, for example, by producing a commitment by those entities to that effect.

…

Where an economic operator relies on the capacities of other entities with regard to criteria relating to economic and financial standing, the contracting authority may require that the economic operator and those entities be jointly liable for the execution of the contract.

…

2. In the case of works contracts, service contracts and siting or installation operations in the context of a supply contract, contracting authorities may require that certain critical tasks be performed directly by the tenderer itself or, where the tender is submitted by a group of economic operators as referred to in Article 19(2), by a participant in that group.'

B – *National law*

1. Legislative Decree No 163 of 12 April 2006[4]

9. Article 49 of Legislative Decree No 163 provides:

'1. The tenderer, 'acting alone or as a member of a consortium or of a group within the meaning of Article 34, in a specific tendering procedure for a public works, services or supply contract, may fulfil the economic, financial, technical and organisational conditions, in other words, obtain an SOA [SOA: Società Organismi di Attestazione, or attestation organisations] certificate …, by relying upon the capacity of another entity or upon the SOA certificate of another entity.

…

6. For works contracts, the tenderer may rely upon the capacities of only one auxiliary undertaking for every qualification category. The invitation to tender may permit reliance upon the capacity of more than one auxiliary undertaking having regard to the value of the contract or the special nature of the services to be provided …'

3 — Directive of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65).

4 — Code on public works contracts, public service contracts and public supply contracts in implementation of Directives 2004/17/EC and 2004/18/EC (Codice dei contratti pubblici relativi a lavori, servizi e forniture in attuazione delle direttive 2004/17/CE e 2004/18/CE) (GURI No 100 of 2 May 2006, Ordinary Supplement No 107), as amended by Legislative Decree No 152 of 11 September 2008 (GURI No 231 of 2 October 2008, Ordinary Supplement No 227); 'Legislative Decree No 163/2006'.

2. Law No 266 of 23 December 2005 [5]

10. Under Article 1(67), first subparagraph, of Law No 266, '[t]he Supervisory Authority on Public Procurement … shall determine annually the amount of the fees payable to it by the public and private persons subject to its supervision and the fee collection procedures, including the obligation of economic operators to pay the fee as a condition for tenders to be admissible to procedures for the carrying out of public works'.

II – **Facts**

11. In November 2012, the Port Authority of Messina (Italy) launched an open tendering procedure, of EU interest, for the award of a four-year public service contract for the management of waste and residues from ships calling at ports within its territorial jurisdiction. The service had previously been run by CRGT srl ('CRGT').

12. The service was awarded to the temporary joint venture Pippo Pizzo and Onofaro Antonino ('Pizzo'), after it was noted that other companies bidding for the contract, including CRGT, had not paid the Supervisory Authority on Public Procurement (Autorità di vigilanza dei contratti pubblici) ('AVCP') the fee provided for in Law No 266/2005 as a condition of the admissibility of their tenders; those companies were therefore excluded from the tendering procedure.

13. CRGT brought an action contesting its exclusion before the Tribunale Amministrativo Regionale Sicilia (Regional Administrative Court of Sicily, 'the TAR') (Catania Division, Fourth Chamber). Pizzo raised a preliminary objection, arguing that CRGT also ought to have been excluded for providing only one of the two declarations by a bank required in the invitation to tender in order to certify its economic and financial standing.

14. The TAR upheld the action brought by CRGT, holding that the latter's exclusion from the tendering procedure was unlawful on the grounds that: a) the documents relating to the call for tenders did not provide for payment of the fee referred to in Law No 266/2005; b) that fee applies explicitly to public works contracts but not to service contracts; and c) that fee may be applied to service contracts only by means of a broad interpretation of Law No 266/2005, which, in accordance with the principle that the grounds for exclusion must be exhaustive, may not place at a disadvantage those tenderers who, through no fault of their own, believed that the fee at issue was not applicable in the circumstances.

15. In addition, the lower court dismissed the preliminary objection raised by Pizzo, declaring that CRGT might, as indeed it had, rely upon the economic and financial standing of an auxiliary undertaking with which it had concluded a contract for that purpose.

16. Pizzo lodged an appeal with the Consiglio di Giustizia Amministrativa per la Regione siciliana (Council of Administrative Justice for the Region of Sicily); that appeal was contested by CRGT which again put forward other pleas raised at first instance that are not relevant to these proceedings.

17. In those circumstances, the Consiglio di Giustizia Amministrativa per la Regione siciliana decided to seek a preliminary ruling.

5 — 2006 Finance Law (Legge finanziaria 2006; GURI No 302 of 29 December 2005, Ordinary Supplement No 211). 'Law No 266/2005'.

III – **The questions referred**

18. The questions in the reference for a preliminary ruling, which was received at the Court Registry on 22 January 2015, are worded as follows:

‘(1) Must Articles 47 and 48 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 be interpreted as precluding national legislation, like the Italian legislation described above, which allows divided reliance upon the capacities of other entities, on the terms set out above, in respect of services?

(2) Do the principles of EU law, and, in particular, those of protection of legitimate expectations, legal certainty and proportionality, preclude a legal rule of a Member State which permits the exclusion from a public tendering procedure of an undertaking which did not understand, because this was not expressly provided in the tender documents, that it was obliged, on pain of exclusion from that procedure, to fulfil the obligation to pay a sum in order to participate in that procedure, even though the existence of that obligation cannot be clearly deduced from the wording of the law in force in the Member State, but can nevertheless be inferred, by means of a twofold legal operation, which involves, first, interpreting extensively certain provisions of that Member State’s positive law and, then, incorporating — in accordance with the outcome of that broad interpretation — the mandatory provisions in the tendering documents?’

19. As far as the first question is concerned, the referring court takes the view that Directive 2014/24 could have fixed limits to the right to rely upon the capacities of a third party in order to meet the criteria of the invitation to tender.

20. As regards the second question, the Consiglio di Giustizia asks also whether the principles of the protection of legitimate expectations, proportionality, legal certainty and *favor participationis* should lead to the company concerned being granted a short period in which to remedy the failure to comply with the obligation to pay.

IV – **The procedure before the Court of Justice. The submissions of the parties**

21. Written observations were lodged by the Italian Government and the Commission.

A – *First question*

22. The Italian Government maintains that the admissibility of the first question raised by the referring court is arguable, for that court has not set out the factual case on which the question is based and has not, therefore, provided the Court of Justice or the parties with the tools necessary for taking a position on the issue raised.

23. The Italian Government submits that the reference to Directive 2014/24 is out of place, because that directive is not applicable to the case and in view of the fact that the period laid down for its transposition has not yet expired. In any case, the Italian Government maintains that that directive is no less favourable than Directive 2004/18 to reliance upon the capacities of third parties.

24. As to the substance, the Italian Government contends that the issue can be resolved in the light of the principles laid down in the judgment in *Swm Costruzioni 2 and Mannocchi Luigino*,[6] which concerned a situation not, in legal terms, significantly different from that at issue in the present case.

6 — Judgment in *Swm Costruzioni 2 and Mannocchi Luigino*, C-94/12, EU:C:2013:646; ‘*Swm Costruzioni*’.

25. The Italian Government maintains, therefore, that the rules of national law in Article 49 of Legislative Decree No 163/2006 are not incompatible with Directive 2004/18.

26. The Commission concurs with the Italian Government that the answer to the first question may be inferred from the case-law laid down in *Swm Costruzioni*. The Court has accepted that an economic operator may, in addition to his own capacities, rely upon the capacities of one or more third parties in order to satisfy the minimum conditions required and not satisfied by him in their entirety.

27. The Commission also concurs with the Italian Government in observing that Directive 2014/24 is not applicable *ratione temporis* to this case.

28. Accordingly, the Commission asserts that Articles 47 and 48 of Directive 2004/18 must be interpreted as meaning that they do not preclude a national provision like that invoked by the referring court.

B – *Second question*

29. As regards the second question, the Italian Government does not believe that any of the principles set out in the order for reference has been infringed. The Italian Government observes that, in addition to the grounds laid down in the legislative decree itself and in the notice of invitation to tender, Article 46(1a) of Legislative Decree No 163/2006 recognises as grounds for exclusion the grounds laid down 'in other legal provisions in force'. It follows, in the Italian Government's submission, that the fact that the *lex specialis* did not mention, as a ground for exclusion, failure to pay the fee to the AVCP is not a factor justifying non-compliance by the tenderer. The tenderer must be aware of all the rules constituting the whole body of mandatory grounds for exclusion, which precisely fill any gaps in that regard in the invitation to tender.

30. The Italian Government likewise contends that tenderers may not remedy shortcomings in their bids after the period prescribed for the submission of those bids has expired, and that only corrections or amplifications made on a limited and specific basis, within the meaning of the judgment in *Manova*,[7] are permissible. The contracting authority may allow tenderers to rectify certain omissions regarding the subjective conditions for participation, but not to remedy a failure to pay a fee. Otherwise, the contracting authority would be permitting late fulfilment of a condition of admissibility had not been satisfied at the appropriate time, thereby compromising the principles of equal treatment, impartiality and transparency.

31. For the Italian Government, it is only in the case of merely formal failure to satisfy a condition (use of a different method of payment from that legally required or failure to certify that payment was made at the time and in the manner prescribed) that the tenderer could be given the opportunity of certifying that he had in fact satisfied the condition concerned.

32. Accordingly, the Italian Government proposes, in answer to the second question, that the principles invoked by the referring court do not preclude national legislation that permits the exclusion of a tenderer who has failed to fulfil an obligation which, while not expressly laid down in law for the type of public contract at issue, can be inferred from the settled interpretation of certain legal provisions by the administrative authorities of the State concerned.

7 — Judgment in *Manova* (C-336/12, EU:C:2013:647, paragraph 32).

33. The Commission, for its part, submits that the second question is specifically concerned with the interpretation of the principle of equal treatment and the obligation of transparency. In the Commission's submission, those principles mean that the contracting authority must state clearly the conditions of the tendering procedure, so that a reasonably informed tenderer exercising ordinary care may be aware of those conditions. The Commission further states that Directive 2004/18 provides that the grounds for exclusion must be set out in the contract notice.

34. The Commission maintains that those requirements are not satisfied when an obligation (in the present case, the payment of a fee to an administrative authority), in respect of which the penalty for non-compliance is exclusion, is not explicitly provided for in the tender documents and cannot be inferred from national statutory law, but can be deduced only from a broad interpretation of that law making it possible to fill the lacuna that would otherwise appear in those documents. The Commission contends that that is a situation particularly prejudicial not only to national economic operators but also to operators established in other Member States, who are thus at risk of finding themselves at a disadvantage.

35. The Commission further submits that the principles of equal treatment and proportionality must be interpreted as not precluding a contracting authority from giving an economic operator the opportunity of fulfilling, within a period fixed by the former, the obligation to pay at issue.

V – **Assessment**

A – *First question*

36. Although the Italian Government casts doubt on the admissibility of the question, it does not go so far as to propose that the question should be ruled inadmissible. Certainly, there are no grounds for dismissing at the outset the question referred by the Consiglio di Giustizia Amministrativa per la Regione siciliana concerning the compatibility with Articles 47 and 48 of Directive 2004/18 of the national provision which, in the context of a procedure for the award of a public services contract, permits divided reliance by an economic operator upon the capacities of another operator in order to satisfy the criteria for participation in the procurement procedure.

37. However, I agree with the Italian Government and the Commission regarding the application to the instant case of the case-law of the Court in *Smw Costruzzioni*, because the two cases are, as far as the legal details at issue are concerned, essentially identical.

38. In *Smw Costruzzioni*, the Court observed that Articles 47(2) and 48(3) of Directive 2004/18 'do not prohibit, in principle, candidates or tenderers from relying on the capacities of more than one third-party entity in order to prove that they meet a minimum capacity level. *A fortiori*, those provisions do not lay down any general prohibition regarding a candidate or tenderer's reliance on the capacities of one or more third-party entities in addition to its own capacities in order to fulfil the criteria set by a contracting authority'. [8]

39. According to the Court, that possibility is not unconditional, but rather is dependent on 'the candidate or tenderer relying on the capacities of one or more other entities [proving] to [the contracting authority] that it will actually have at its disposal the resources of those entities necessary for the [performance] of the contract'. [9]

8 — Judgment in *Smw Costruzzioni* (C-94/12, EU:C:2013:646, paragraph 30).

9 — Judgment in *Smw Costruzzioni* (C-94/12, EU:C:2013:646, paragraph 33).

40. Admittedly, the Court found that it was true that there could be 'works with special requirements necessitating a certain capacity which cannot be obtained by combining the capacities of more than one operator, which, individually, would be inadequate',[10] circumstances in which it is possible to '[require] that the minimum capacity level concerned be achieved by a single economic operator or, where appropriate, by relying on a limited number of economic operators, in accordance with the second subparagraph of Article 44(2) of Directive 2004/18, as long as that requirement is related and proportionate to the subject matter of the contract at issue.'[11] However, the Court held that 'those circumstances constitute an exception'[12] and observed that, consequently, 'Directive 2004/18 precludes that requirement being made a general rule under national law, which is the effect of a provision such as Article 49(6) of Legislative Decree No 163/2006'.[13]

41. In the light of the foregoing, the question referred by the Consiglio di Giustizia Amministrativa per la Regione siciliana can be answered in the same terms as the ruling of the Court in *Smw Costruzioni*. It must also be observed, as the Commission does,[14] that in this case the exceptional circumstances which, in accordance with paragraph 35 of that judgment, make it possible to '[require] that the minimum capacity level concerned be achieved by a single economic operator' are not present in this case, since the capacity at issue is of a purely economic nature.

42. The referring court argues that, beyond what may be inferred from Directive 2004/18, Directive 2014/24 could have imposed stricter limits on the right to rely on the capacities of third parties to fulfil the award criteria. For their part, the Italian Government and the Commission agree that the latter directive is not applicable to the situation at issue. I fully concur with that view.

43. The referring court admits that the period prescribed for transposition of Directive 2014/24 has not yet expired, sufficient reason to set aside the application of that directive in this case, but the referring court invokes 'the obligation for national courts to select and prefer, among all the possible interpretations of the domestic law, only an interpretation in conformity with the EU rules to be transposed'.[15]

44. The Court's case-law obliges Member States to 'refrain from taking any measures liable seriously to compromise the result prescribed' by the directive during the period prescribed for transposition,[16] but does not go so far as to require national courts to interpret their own domestic law in terms that fully comply with a directive for which the period fixed for transposition has not yet ended.

45. Moreover, the assertion of the Consiglio di Giustizia Amministrativa per la Regione siciliana, to the effect that Directive 2014/24 is more restrictive than Directive 2004/18 as regards the right to rely upon the capacities of third parties, is debatable; however, that is a subject of which I do not believe any substantive clarification is necessary, given its irrelevance to the case.

46. Accordingly, it is my view that Articles 47 and 48 of Directive 2004/18 do not preclude national legislation that, in the circumstances of the case at issue in the main proceedings, permits divided reliance upon the capacities of other entities in order to fulfil the selection criteria.

10 — Judgment in *Smw Costruzzioni* (C-94/12, EU:C:2013:646, paragraph 35).

11 — Loc. cit.

12 — Judgment in *Smw Costruzzioni* (C-94/12, EU:C:2013:646, paragraph 36).

13 — Loc. cit.

14 — Paragraph 30 of its written observations.

15 — Point C1 of the order for reference.

16 — Judgment in *Inter-Environnement Wallonie* (C-129/96, EU:C:1997:628, paragraph 45).

B – *Second question*

47. To my mind, the second question from the referring court is trickier. The different positions adopted by the Italian Government and the Commission bear testimony to the difficulty of the question. Whereas the Italian Government maintains that the excluded operator could not have been unaware of the applicability of the disputed condition (prior payment of the fee to the AVCP), the Commission submits that that condition could be applied only if it were expressly included in the tender documents or could be clearly inferred from the statutory law in force.

48. My view is that, in fact, those two positions are closer than might be imagined. In that connection, the Italian Government has focused on the criterion of the requirement of knowledge of the disputed condition, while the Commission has focused on the criterion of publication of that condition. In short, the two perspectives are complementary, for publication of the condition leads to knowledge of the condition and that is feasible (and may be required) only if the condition has been properly published.

49. The case-law of the Court insists that it is necessary that 'all the conditions and detailed rules of the award procedure [should] be drawn up in a clear, precise and unequivocal manner in the contract notice or specifications so that, first, all reasonably informed tenderers exercising ordinary care can understand their exact significance and interpret them in the same way and, second, the contracting authority is able to ascertain whether the bids submitted satisfy the criteria applying to the contract in question'. [17]

50. The obligation of 'clear, precise and unequivocal' publication is imposed, first, by the principle of equal treatment, which 'requires tenderers to be afforded equality of opportunity when formulating their bids, which therefore implies that the bids of all tenderers must be subject to the same conditions', [18] and, second, by the principle of transparency, the aim of which is 'to preclude any risk of favouritism or arbitrariness on the part of the contracting authority'. [19] Article 2 of Directive 2004/18 refers to the principle of equal treatment and the obligation to act transparently as '[p]rinciples of awarding contracts' that must be observed by contracting authorities.

51. There is no doubt, therefore, that tenderers must be in a position to be informed of all the conditions of the tender, a requirement that satisfies the basic principles of equality and transparency. However, greater doubt surrounds the extent to which *all* the requirements for participation in the tendering procedure must be explicitly stated in the contract notice or specifications, or whether, on the other hand, certain general requirements may be deemed to be well known, even if they are not explicitly set out in those documents.

52. In my opinion, given the aim of the obligation to publish the conditions, which is to ensure that the content and significance of those conditions are understood by 'all reasonably informed tenderers exercising ordinary care', it would be illogical for all contracting authorities to be obliged also to specify those conditions the fulfilment of which is required by generally applicable legislative provisions of which a reasonably informed tenderer exercising ordinary care cannot be unaware. I am thinking, for example, of the basic conditions which, in the context of civil and commercial law, affect the legal capacity of individuals and companies, conditions of which no economic operator may be ignorant or require the explicit, detailed inclusion in documents relating to a public procurement procedure.

17 — Judgment in *Cartiera dell'Adda* (C-42/13, EU:C:2014:2345, paragraph 44), citing the judgment in *Commission* v *CAS Succhi di Frutta* (C-496/99 P, EU:C:2004:236, paragraphs 108 to 111).

18 — Loc. cit.

19 — Loc. cit.

53. It is true that uncertainty may arise in relation to other less 'obvious', or, to put it another way, less 'logical' or 'natural', conditions which, never the less, reasonably informed tenderers exercising minimum care are required to be aware of. To my mind, the levels of care and information that may be reasonably required of a tenderer constitute the decisive criteria for the purposes of a proper understanding of the intended spirit of Article 2 of Directive 2004/18 and the way the Court interprets the principles of equality and transparency in that context. [20]

54. The Italian Government argues in its written observations [21] that Article 46(1a) of Legislative Decree No 163/2006 defines as exclusion clauses, in addition to those provided for in the legislative decree itself and in the contract notice, those clauses laid down by 'other legal provisions in force'. Those 'other legal provisions' may include provisions relating to tax obligations common to all tenderers, in respect of which tenderers must make payment or risk exclusion from the tendering procedure.

55. Article 27(1) of Directive 2004/18 does not specifically require tender specifications to specify in detail all 'the obligations relating to taxes, to environmental protection, to the employment protection provisions and to the working conditions which are in force in the Member State'. Tenderers or candidates continue to be bound by those obligations — failure to fulfil which may lead to their exclusion — even if the obligations are not set out in the tender documents.

56. It is for Italian law, as interpreted by the Italian courts, to determine whether payment of the fee to the AVCP may, on account of its characteristics, be classified as an obligation relating to taxes in the broad sense. It is likewise for the Italian courts (confirming or rejecting the interpretation of the public authority to which payment of the fee must be made) to determine the subjective and objective scopes of Articles 65 and 67 of Law No 266/2005, governing the fee failure to pay which led to the exclusion of CRGT from the tendering procedure.

57. The Court ought not to take part in the debate — which it would regard as purely an internal matter — concerning whether the Italian administrative and judicial authorities have given a broader, or less broad, interpretation of the provisions of Law No 266/2005. If, according to what may be deduced from the order for reference, the AVCP has consistently interpreted Law No 266/2005 as meaning that the requirement to pay the fee is applicable to service contracts, and that view has been endorsed by the Consiglio di Stato as the court of last instance in matters of national law, that interpretation must be respected.

58. Those same considerations are applicable to the exclusionary effect of failure to pay the fee. Again — according to the information available in the case-file — both the AVCP and the courts which have supported its view have held that failure to fulfil the obligation to pay that fee, laid down in the mandatory provision but not in the tender specifications, leads unavoidably to exclusion from the tendering procedure.

59. All the indications are that the interpretation of the legality underpinning the application of Articles 65 and 67 of Law No 266/2005 to service contracts is derived from a statement of the law laid down by the competent administrative authority, the AVCP, at least as long ago as 2008. That interpretation appears to have been endorsed by the highest national administrative court in a line of case-law beginning on a date which has not been specified in these proceedings. In any case, it might logically be concluded that the case-law concerned is regularly applied by the AVCP in all procurement

20 — In addition to the judgments in *Cartiera del'Adda* (C-42/13, EU:C:2014:2345), and *Commission* v *CAS Succhi di Frutta* (C-496/99 P, EU:C:2004:236), reference should also be made to, inter alia, the judgments in *SIAC Construction* (C-19/00, EU:C:2001:553); *La Cascina* (C-226/04 and C-228/04, EU:C:2006:94); *Manova* (C-336/12, EU:C:13:647); and *eVigilo* (C-538/13, EU:C:2015:166).

21 — Point 66.

procedures for the award of service contracts (in fact, the Italian Government refers to a number of decisions adopted in consecutive years by the AVCP in that regard). Finally, it must be presumed that the excluded economic operator in the main proceedings (CRGT), which previously ran the service covered by the invitation to tender, knew or was in a position to have known about it.

60. Subject to those reservations, the exclusion clause is therefore one which, if not explicitly included in the contract notice or tender specifications, is formulated as a result of the settled, judicially authorised interpretation of a legislative provision. The interpretation adopted by the AVCP and endorsed by the courts favours the inadmissibility of bids submitted without payment of the fee.

61. I accept that, theoretically, the condition concerned could be categorised as one that is difficult to identify, meaning that, in principle, its application is not compatible with the relevant case-law of the Court. However, I believe that it may be regarded differently if we confine ourselves to the criterion of the reasonably informed tenderer exercising minimum care, although, as I shall explain below, the Court may perhaps not be in the best position to observe this.

62. Only the referring court is in a position to determine whether, in the specific circumstances of the case, the tenderer excluded could have been unaware of the interpretation of Law No 266/2005 or the practice followed in the type of tendering procedure concerned, consolidated by settled administrative application and pursuant to which the fee must also be paid to the AVCP in relation to service contracts. For the purposes of the referring court's determination, it may be helpful to ascertain whether the excluded tenderer has participated in tendering procedures with the same features, in which the clause at issue was considered to be applicable on the basis of the interpretation of Law No 266/2005 adopted by the AVCP.

63. In short, it is for the referring court to determine whether undertakings tendering for public contracts are sufficiently familiar with the statement of the law adopted by the AVCP and the case-law of the Consiglio di Stato to suggest that a reasonably informed tenderer exercising normal care could not have been ignorant of it.

64. That assertion leads to another, which I believe is relevant from the point of view of the principle of equal treatment. That is, if it were to be concluded that, in practice, tenderers in general are aware of the interpretation of the law adopted by the AVCP and, therefore, duly pay the disputed fee, it would constitute discrimination to waive compliance with that obligation in relation to a particular tenderer.

65. Admittedly, as the Commission has pointed out,[22] the application of a clause of the kind at issue in this case may be particularly disadvantageous for tenderers established in other Member States, whose level of knowledge of national law and the valid interpretation thereof may not be comparable to that of national tenderers. However, the criterion of the reasonably informed tenderer exercising ordinary care, which is crucial to the solution I propose, makes it possible to overcome that difficulty, for the level of information and care must in each case be adapted to the features of the tenderer concerned, so that, in the instant case, ignorance that would be inexcusable in CRGT could perhaps be excused in a foreign tenderer.

66. All that remains is the uncertainty whether failure to fulfil the obligation to pay the fee laid down in Law No 266/2005 may be remedied. In that connection, I, like the Commission, take the view that, if the referring court accepts that a reasonably informed tenderer exercising ordinary care was unaware of the existence of that obligation, the contracting authority must grant the tenderer a sufficient period in which to remedy the defect. That is a consequence which follows, *a contrario*, from the

22 — Point 38, *in fine*, of its written observations.

case-law of the Court, according to which a contracting authority is not required to accept 'any rectification of omissions which, as expressly provided for in the contract documentation, must result in the exclusion of the bid.'[23] That would be the case of an infringement of an obligation that cannot be inferred from that which is 'expressly provided for in the contract documentation'.

67. In summary, EU law does not preclude national legislation that permits the exclusion from a public procurement procedure of a tenderer having failed to fulfil an obligation of a tax nature which, even though it is not expressly set out in the contract notice or the tender specifications, is imposed as a result of the settled, judicially sanctioned, administrative interpretation of the applicable national legislation, provided that that obligation is not one of which a reasonably informed tenderer exercising ordinary care could have been unaware, a matter which it is for the national court to determine. If it is established that knowledge of that obligation may not be required, the contracting authority must grant the excluded tenderer a sufficient period in which to remedy its omission.

VI – **Conclusion**

68. In the light of the considerations set out, I propose that the Court should reply as follows to the questions referred for a preliminary ruling:

(1) Articles 47 and 48 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts must be interpreted as not precluding national legislation that, in the circumstances of the case at issue in the main proceedings, permits divided reliance upon the capacities of other entities, on the terms set out above, in the sphere of services.

(2) The principles of EU law, in particular the principles of equal treatment and transparency, do not preclude national legislation that permits the exclusion from a public procurement procedure of a tenderer having failed to fulfil an obligation of a tax nature which, even though it is not expressly set out in the contract notice or the tender specifications, is imposed as a result of the settled, judicially sanctioned, administrative interpretation of the applicable national legislation, provided that that obligation is not one of which a reasonably informed tenderer exercising ordinary care could have been unaware, a matter which it is for the national court to determine. If it is established that knowledge of that obligation may not be required, the contracting authority must grant the excluded tenderer a sufficient period in which to remedy its omission.

23 — Judgment in *Cartiera dell'Adda* (C-42/13, EU:C:2014:2345, paragraph 46).