JUDGMENT OF THE COURT (First Chamber)

9 February 2006 *

In Joined Cases C-226/04 and C-228/04,

REFERENCES for a preliminary ruling under Article 234 EC, made by the Tribunale amministrativo regionale del Lazio (Italy), by decisions of 22 April 2004, received at the Court on 2 June 2004, in the proceedings

La Cascina Soc. coop. arl,

Zilch Srl (C-226/04)

v

Ministero della Difesa,

Ministero dell'Economia e delle Finanze,

* Language of the case: Italian.

Pedus Service,

Cooperativa Italiana di Ristorazione soc. coop. arl (CIR),

Istituto nazionale per l'assicurazione contro gli infortuni sul lavoro (INAIL),

and

Consorzio G.f.M. (C-228/04)

v

Ministero della Difesa,

La Cascina Soc. coop. arl,

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, K. Schiemann, N. Colneric, K. Lenaerts and E. Juhász (Rapporteur), Judges,

Advocate General: M. Poiares Maduro,
Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 30 June 2005,

after considering the observations submitted on behalf of:

— La Cascina Soc. coop. arl and Zilch Srl, by D. Grossi, G. Romano-Cesareo and D. Cusmano, avvocati,

— the Italian Government, by I.M. Braguglia, acting as Agent, and D. Del Gaizo, avvocato dello Stato,

— the Austrian Government, by M. Fruhmann, acting as Agent,

— the Commission of the European Communities, by A. Aresu and K. Wiedner, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 8 September 2005,

gives the following

Judgment

1 These references for a preliminary ruling concern the interpretation of subparagraphs (e) and (f) of the first paragraph of Article 29 of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1) ('the Directive').

2 The references were made in proceedings between La Cascina Soc. coop. arl ('La Cascina') and Zilch Srl ('Zilch'), and the Consorzio G.f.M. ('G.f.M.'), on the one hand, and the Italian Ministry of Defence and Ministry of Economy and Finance, on the other, in their capacity as contracting authorities, as regards (i) the exclusion of those undertakings from participation in a procurement procedure for public service contracts and (ii) the compatibility with Article 29 of the Directive of the corresponding provision of Italian legislation which transposes that directive into national law.

Legal background

Community law

3 It is clear from the second and third recitals in the preamble to the Directive that it was adopted in the context of measures 'aimed at progressively establishing the internal market' and that for that purpose it aims to achieve 'the coordination of the procurement procedures for the award of public service contracts'.

4 The 20th recital in the preamble to the Directive states that '... to eliminate practices that restrict competition in general and participation in contracts by other Member States' nationals in particular, it is necessary to improve the access of service providers to procedures for the award of contracts'.

5 In order to open public contracts to the widest possible competition, Article 13(5) of the Directive provides, in relation to the organisation of design contests, that, '[i]n any event, the number of candidates invited to participate shall be sufficient to ensure genuine competition'. Similarly, in respect of restricted procedures, Article 27(2), second subparagraph, of that directive states that '[i]n any event, the number of candidates invited to tender shall be sufficient to ensure genuine competition'.

6 As part of Chapter 2 of Title VI of the Directive, entitled 'Criteria for qualitative selection', Article 29 provides:

'Any service provider may be excluded from participation in a contract who:

(a) is bankrupt or is being wound up, whose affairs are being administered by the court, who has entered into an arrangement with creditors, who has suspended business activities or who is in any analogous situation arising from a similar procedure under national laws and regulations;

(b) is the subject of proceedings for a declaration of bankruptcy, for an order for compulsory winding-up or administration by the court or for an arrangement with creditors or of any other similar proceedings under national laws or regulations;

(c) has been convicted of an offence concerning his professional conduct by a judgment which has the force of res judicata;

(d) has been guilty of grave professional misconduct proven by any means which the contracting authorities can justify;

(e) has not fulfilled obligations relating to the payment of social security contributions in accordance with the legal provisions of the country in which he is established or with those of the country of the contracting authority;

(f) has not fulfilled obligations relating to the payment of taxes in accordance with the legal provisions of the country of the contracting authority;

(g) is guilty of serious misrepresentation in supplying or failing to supply the information that may be required under this Chapter.

Where the contracting authority requires of the service provider proof that none of the cases quoted in (a), (b), (c), (e), or (f) applies to him, it shall accept as sufficient evidence:

— ...

— for (e) or (f), a certificate issued by the competent authority in the Member State concerned.

...

Member States shall, within the time limit referred to in Article 44, designate the authorities and bodies competent to issue such documents or certificates and shall forthwith inform the other Member States and the Commission thereof.'

National law

7 The Directive was transposed into Italian law by Legislative Decree No 157 of 17 March 1995 (GURI No 104 of 6 May 1995) ('Decree No 157/1995').

8 Article 12(d) and (e) of that decree, as replaced by Article 10 of Legislative Decree No 65 of 25 February 2000 (GURI No 70 of 24 March 2000) ('Article 12 of Decree No 157/1995'), which transposes Article 29 of the Directive into national law, provides:

'candidates shall be excluded from participation in contracts who:

are not in compliance in respect of obligations relating to the payment of social security contributions for employees, in accordance with Italian legislation or the legislation of the State in which they are established;

are not in compliance in respect of obligations relating to the payment of taxes, in accordance with Italian legislation or the legislation of the State in which they are established.'

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

9 In December 2002 the Italian Ministry of Defence, together with the Ministry of Economy and Finance, published in the *Gazzetta ufficiale della Repubblica italiana* and the *Official Journal of the European Communities* a restricted and accelerated call for tenders for the award of the contract to supply catering services to Ministry of Defence bodies and departments stationed in national territory. The final date for receipt of requests to participate was set at 15 January 2003 and the final date for receipt of tenders at 3 March 2003.

10 That call for tenders was divided into 16 lots. For each lot there was provision for a different annual value, a specific area to be covered and a range of specific services to be provided.

11 La Cascina and Zilch, as part of a temporary joint venture, were among those who responded to that call for tenders, in respect of the majority of the 16 lots, and G.f.M. responded in respect of Lot No 7.

12 On 4 December 2003 the contracting authority decided to exclude La Cascina and G.f.M. from the procedure on the ground that they were not in compliance with their obligations relating to the payment of social security contributions for employees, and Zilch on the ground that it was not in compliance with its obligations relating to the payment of taxes.

13 The three bodies in question requested the annulment of that decision before the referring court. In particular, La Cascina and G.f.M. argued that the failure to pay social security contributions had subsequently been regularised. For its part, Zilch stated that one part of the taxes claimed had been the subject of tax relief and that the other part had benefited from a 'tax amnesty' under a regularisation measure adopted by the national legislature in 2002, on the basis of which it had been authorised to make payment in instalments.

14 The contracting authority argued, on the other hand, that the subsequent regularisation did not mean that the applicant undertakings were in compliance with their obligations at the time the period prescribed for submitting requests to participate in the tendering procedure expired on 15 January 2003.

15 The referring court notes a difference in the wording of Article 29 of the Directive and Article 12 of Decree No 157/1995. Whereas the Community provision provides for the power to exclude from participation in a contract a service provider who 'has not fulfilled' obligations, the national provision excludes a person who is 'not in compliance' with his obligations.

16 The national court wishes to know therefore whether the national provision at issue in the main proceedings is more permissive and allows more freedom to the national authorities and it refers, in that regard, to the various interpretations in decisions given on that subject by the Italian courts. Some of those courts accept subsequent regularisation, that is after expiry of the period prescribed for submitting requests to participate in the contract, in two types of situation:

— where the parties concerned have contested the validity of their obligations before the competent national administrative authorities or courts,

— where the parties concerned, who have in fact failed to fulfil their obligations, have however benefited either from leniency measures on the part of the State which has given them the opportunity subsequently to regularise their position relating to tax and social security, or from a tax amnesty.

17 Taking the view that such an interpretation might lead to unequal treatment of service providers and obstruct the procedure for the award of a contract, the Tribunale amministrativo regionale del Lazio decided to stay its proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Must the Directive in question, as regards only the abovementioned provisions, be interpreted as meaning that, where the Community legislature employs the expression "has not fulfilled obligations relating to the payment of social security contributions in accordance with the legal provisions of the country in which he is established or with those of the country of the contracting authority" or "has not fulfilled obligations relating to the payment of taxes in accordance with the legal provisions of the country of the contracting authority", the legislature intended to refer — solely and exclusively — to a situation in which the person concerned has — when the period prescribed for submitting requests to participate in a public tendering procedure expires (or in any event before the award of the contract) — fulfilled those obligations by paying in full and in time?

(2) Consequently, must the Italian national implementing measure [Article 12(d) and (e) of Legislative Decree No 157 of 17 March 1995] — in so far as, unlike the Community provision cited above, it allows the exclusion from tendering

procedures of persons who "are not in compliance in respect of obligations relating to the payment of social security contributions for employees, in accordance with Italian legislation or the legislation of the State in which they are established" or who "are not in compliance in respect of obligations relating to the payment of taxes, in accordance with Italian legislation or the legislation of the State in which they are established" — be interpreted with reference solely to the failure — verifiable at the date mentioned above (the expiry of the period prescribed for submitting requests to participate or immediately before the award, even provisional, of the contract) — to fulfil those obligations, without any importance being attached to subsequent "regularisation" of their position?

(3) Or, conversely (if, in the light of the indications set out in question 2 above, the national measure is held not to be in harmony with the rationale and function of the Community provision), may the national legislature be regarded, in the light of the limitations to which it is subject for the purpose of giving effect to the Community rules contained in the Directive at issue, as being entitled to introduce the option of allowing the admission to a tendering procedure of persons who, although not "in compliance" when the period prescribed for participation in the procedure expires, nevertheless show that they can regularise their position (and have taken positive steps to do so) before the award of the contract?

(4) And, if the interpretation referred to in question 3 above is held to be workable — thus permitting the introduction of more flexible rules than would be allowed on a stricter interpretation of the "fulfilment" of obligations referred to by the Community legislature — do such rules conflict with fundamental Community principles, such as the principle of equal treatment for all citizens of the Union, or — with regard only to public tendering procedures — that of equal conditions for all persons who have applied for admission to such procedures?'

On the questions

18 It must be observed as a preliminary point that, in accordance with the provisions of Title II of the Directive, the application of its provisions varies according to the categorisation of the services in question. However, since that categorisation requires an assessment of the facts, it falls within the jurisdiction of the national court, and the Court will therefore interpret the provisions of the Directive to which the reference for a preliminary ruling refers. Furthermore, it is clear from that reference that it concerns a restricted procedure within the meaning of the Directive.

19 By its questions, the national court wishes in substance to know, firstly, whether subparagraphs (e) and (f) of the first paragraph of Article 29 must be interpreted as precluding a national provision which refers to the position of service providers who are 'not in compliance' with social security or tax obligations. Secondly, it wishes to know the time at which the service provider must provide evidence that he has complied with those obligations. Thirdly, it is unsure whether a service provider who is late with payment of its social security contributions or taxes, has been authorised by the competent authorities to make payment of those contributions or taxes in instalments, or has brought administrative or judicial proceedings to contest the existence or amount of its social security or tax obligations must be regarded as not having fulfilled his social security or tax obligations for the purposes of subparagraphs (e) and (f) of the first paragraph of Article 29 of the Directive.

20 In order to provide a useful reply to those questions, it must be observed as a preliminary point that the Community directives on public contracts aim to coordinate national procedures in that field. As regards, more particularly, public service contracts, the third recital in the preamble to the Directive states that the objectives set out in the first and second recitals '... require the coordination of the procurement procedures for the award of public service contracts'.

21 As regards that coordination, Article 29 of the Directive lays down seven grounds for excluding candidates from participation in a contract, which relate to their professional honesty, solvency and reliability. That provision leaves the application of all those cases of exclusion to the assessment of the Member States, as evidenced by the phrase 'may be excluded from participation in a contract', which appears at the beginning of that provision and makes express reference, in subparagraphs (e) and (f), to the provisions of national law.

22 Thus, as the Commission of the European Communities rightly pointed out, Article 29 itself lays down the only limits to the power of the Member States in the sense that they cannot provide for grounds of exclusion other than those mentioned therein. That power of the Member States is also limited by the general principles of transparency and equal treatment (see, inter alia, Case C-470/99 *Universale-Bau and Others* [2002] ECR I-11617, paragraphs 91 and 92, and Case C-421/01 *Traunfellner* [2003] ECR I-11941, paragraph 29).

23 Accordingly, Article 29 of the Directive does not provide in this field for uniform application of the grounds of exclusion mentioned therein at Community level, since the Member States may choose not to apply those grounds of exclusion at all and opt for the widest possible participation in procedures for the award of public contracts or to incorporate them into national law with varying degrees of rigour according to legal, economic or social considerations prevailing at national level. In that context the Member States have the power to make the criteria laid down in Article 29 of the Directive less onerous or more flexible.

24 As regards, first, the question whether subparagraphs (e) and (f) of the first paragraph of Article 29 of the Directive must be interpreted as precluding a provision of national law which refers to the position of service providers who are 'not in compliance' with social security or tax obligations, that provision enables Member States to exclude any candidate who 'has not fulfilled obligations' relating to the payment of social security contributions and taxes 'in accordance with [national] legal provisions'.

25 That provision does not contain a definition of 'has not fulfilled obligations'. In the light of the considerations set out in paragraph 23 of this judgment, the authors of the Directive did not intend to give that concept an autonomous Community definition, but referred to national rules for that purpose. It is therefore for national rules to specify the content and scope of the obligations at issue and the conditions for their fulfilment.

26 The Italian legislature has made use of the power given to it under subparagraphs (e) and (f) of the first paragraph of Article 29 of the Directive, by inserting the two grounds of exclusion in question into Article 12(d) and (e) of Legislative Decree No 157/1995. However, the national court asks, first of all, whether, by using the terms 'who are not in compliance in respect of obligations ...', that provision is more permissive and whether it gives more latitude to the national authorities compared with the wording in subparagraphs (e) and (f) of Article 29 of the Directive.

27 As the parties concerned who submitted observations to the Court have rightly observed, the words 'non abbia adempiuto' its obligations or 'non sia in regola con' its obligations (both expressions being rendered as 'has not fulfilled obligations' in English) are both used indiscriminately in the various Community directives on public procurement. For example, Article 24(e) and (f) of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54), Article 20(1)(e) and (f) of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1) and, finally, Article 45(2)(e) and (f) 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), which entered into force on 31 January 2006. There is not, therefore, any difference in content between the two expressions at issue.

28 On the basis of those considerations it is appropriate to consider the various situations to which the national court refers.

29 The national court asks, secondly, whether, in order to have fulfilled his obligations relating to social security contributions and taxes, the service provider must, 'when the period prescribed for submitting requests to participate in a public tendering procedure expires or in any event before the award of the contract', have made the relevant payment 'in full and in time'.

30 In order to establish the time at which to determine whether the candidate has fulfilled his obligations it should be observed that subparagraphs (e) and (f) of the first paragraph of Article 29 of the Directive refer to the legal provisions of the Member States in order to determine the meaning of the expression 'fulfilled obligations', and that the Community legislature did not wish to make the application of that article uniform at Community level; it is logical to find that in order to establish the relevant time reference should also be made to national provisions.

31 It is, therefore, for national rules to determine the date by which or the period within which the persons concerned must have made the payments corresponding to their obligations or, as regards the other situations contemplated by the national court which are dealt with in paragraphs 34 to 39 of this judgment, must have proved that the conditions for subsequent regularisation have been fulfilled. That period may be, inter alia, the final date for lodging the request to participate in the contract, the date on which the invitation to tender was sent, the final date on which the candidates' tenders are to be lodged, the date on which tenders are considered by the contracting authority or even immediately prior to the award of the contract.

32 It should be stated, however, that the principles of transparency and equal treatment which govern all procedures for the award of public contracts, according to which the substantive and procedural conditions concerning participation in a contract must be clearly defined in advance, require that the period be determined with absolute certainty and made public in order that the persons concerned may know

exactly the procedural requirements and be sure that the same requirements apply to all candidates. That period may be fixed by national legislation or the latter may confer that responsibility on the contracting authorities.

33 Therefore, a candidate is regarded as having fulfilled its obligations if, within the period referred to in paragraph 31 above, he has made all the payments relating to his social security or tax debts, subject to the cases of subsequent regularisation or bringing of administrative or legal proceedings, which are dealt with in paragraphs 34 to 39 of this judgment. Merely commencing payment at the relevant time, proof of intention to pay or proof of financial capacity to regularise the position after that time are not sufficient, in order to avoid infringing the principle of equal treatment of candidates.

34 Thirdly, the national court's reference is essentially concerned with whether it is compatible with subparagraphs (e) and (f) of the first paragraph of Article 29 of the Directive for a national rule or administrative practice which enables service providers, for the purpose of being admitted to a procedure for the award of a public contract, subsequently to regularise their position as regards tax and social security pursuant to leniency measures or a tax amnesty adopted by the Member State at issue or pursuant to an administrative arrangement of payment by instalment or debt relief.

35 It must be observed in that regard that, as the Advocate General rightly stated in point 29 of his Opinion, the amount and the date on which tax and social security obligations are due are defined by national law. Similarly, it was stated in paragraph 25 above that it is also for national law to determine the content and scope of 'has fulfilled obligations'. Moreover, the relevant period in that regard is that fixed by national law, as stated in paragraph 31 of this judgment.

36 Accordingly, a national law or administrative practice according to which, in the event of leniency measures or a tax amnesty or as a result of an administrative arrangement, the candidates concerned are regarded as being in compliance with their obligations for the purpose of being admitted to a procedure for the award of a contract is not incompatible with subparagraphs (e) and (f) of the first paragraph of Article 29, provided that in the period referred to in paragraph 31 of this judgment they can provide evidence that they have benefited from leniency measures, a tax amnesty or an administrative arrangement in respect of their debts.

37 The national court's reference concerns lastly the effects to be attributed to a candidate's bringing administrative or legal proceedings against the findings of the competent tax or social security authorities in order to establish whether the candidate is in compliance with his obligations with a view to his admission to a procedure for the award of a public contract.

38 It must be held that the reference to national law under subparagraphs (e) and (f) of the first paragraph of Article 29 of the Directive is also applicable in respect of that question. Nevertheless, the effects of bringing administrative or legal proceedings are closely linked to the exercise and safeguard of fundamental rights in relation to judicial protection, respect for which is also guaranteed by the Community legal order. National legislation which paid no heed to the effects of bringing administrative or legal proceedings on the opportunity to participate in a procedure for the award of a contract would risk infringing the fundamental rights of the parties concerned.

39 Taking account of that limitation, it is therefore for national law to determine whether bringing administrative or legal proceedings has effects which require the contracting authority to take the view that the candidate concerned is in compliance with his obligations, pending a final decision, for the purpose of his admission to the procedure for the award of a contract, provided that such proceedings are brought within the period referred to in paragraph 31 of this judgment.

40 Therefore, the answer to the questions referred for a preliminary ruling must be that subparagraphs (e) and (f) of the first paragraph of Article 29 of the Directive do not preclude a national law or administrative practice according to which a service provider, who has not fulfilled obligations relating to social security contributions and taxes by having paid in full when the period prescribed for submitting the request to participate in the contract expires, may subsequently regularise his position

— pursuant to a tax amnesty or leniency measures adopted by the State, or

— pursuant to an administrative arrangement of payment in instalments or debt relief, or

— by bringing administrative or legal proceedings,

provided that, within the period prescribed by national law or administrative practice, he provides evidence that he has benefited from such measures or arrangement or that he has brought such proceedings within that period.

Costs

41 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 (First Chamber) hereby rules:

Subparagraphs (e) and (f) of the first paragraph of Article 29 of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts do not preclude a national law or administrative practice according to which a service provider, who has not fulfilled obligations relating to social security contributions and taxes by having paid in full when the period prescribed for submitting the request to participate in the contract expires, may subsequently regularise his position

— **pursuant to a tax amnesty or leniency measures adopted by the State, or**

— **pursuant to an administrative arrangement of payment in instalments or debt relief, or**

— **by bringing administrative or legal proceedings,**

provided that, within the period prescribed by national law or administrative practice, he provides evidence that he has benefited from such measures or arrangement or that he has brought such proceedings within that period.

[Signatures]