Reports of Cases

JUDGMENT OF THE COURT (Sixth Chamber)

8 February 2018 *

(Reference for a preliminary ruling — Public procurement — Articles 49 and 56 TFEU — Directive 2004/18/EC — Reasons for exclusion from a tendering procedure — Insurance services — Participation of several Lloyd's of London syndicates in the same tendering procedure — Signature of tenders by the Lloyd's of London General Representative for the country concerned — Principles of transparency, equal treatment and non-discrimination — Proportionality)

In Case C-144/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunale amministrativo regionale per la Calabria (Regional Administrative Court, Calabria, Italy), made by decision of 22 February 2017, received at the Court on 22 March 2017, in the proceedings

Lloyd's of London

v

Agenzia Regionale per la Protezione dell'Ambiente della Calabria,

THE COURT (Sixth Chamber),

composed of C.G. Fernlund, President of the Chamber, J.-C. Bonichot and E. Regan (Rapporteur), Judges,

Advocate General: E. Tanchev,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Lloyd's of London, by R. Villata, A. Degli Esposti and P. Biavati, avvocati,

– Agenzia Regionale per la Protezione dell'Ambiente della Calabria, by V. Zicaro, avvocato,

– the Italian Government, by G. Palmieri, acting as Agent, and by E. De Bonis, avvocato dello Stato,

– the European Commission, by N. Khan, G. Gattinara and P. Ondrůšek, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

* Language of the case: Italian.

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of the principles of transparency, equal treatment and non-discrimination which derive from Articles 49 and 56 TFEU and are referred to in Article 2 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).

2 The request has been made in proceedings between Lloyd's of London ('Lloyd's') and the Agenzia Regionale per la Protezione dell'Ambiente della Calabria (Calabria Regional Environmental Protection Agency, Italy) ('Arpacal'), concerning the decision of the latter to exclude two syndicates of Lloyd's from the procedure for the award of a public service contract for insurance.

Legal context

European Union law

Directive 2004/18

3 As stated in recital 46 of Directive 2004/18:

'Contracts should be awarded on the basis of objective criteria which ensure compliance with the principles of transparency, non-discrimination and equal treatment and which guarantee that tenders are assessed in conditions of effective competition. …'

4 Article 2 of that directive provided:

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

5 Article 45 of the directive specified the reasons for excluding an economic operator from participation in a tendering procedure.

6 Directive 2004/18 was repealed by Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement (OJ 2014 L 94, p. 65). Under Article 90(1) of Directive 2014/24, the Member States were to bring into force the measures necessary to comply with that directive by 18 April 2016 at the latest. Pursuant to Article 91 of that directive, the repeal of Directive 2004/18 took effect on the same date.

Directive 2009/138/EC

7 Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (OJ 2009 L 335, p. 1), provides, in Article 145(2), entitled 'Conditions for branch establishment', as follows:

'Member States shall require every insurance undertaking that proposes to establish a branch within the territory of another Member State to provide the following information when effecting the notification provided for in paragraph 1:

…

(c) the name of a person who possesses sufficient powers to bind, in relation to third parties, the insurance undertaking or, in the case of Lloyd's, the underwriters concerned and to represent it or them in relations with the authorities and courts of the host Member State (the authorised agent);

…

With regard to Lloyd's, in the event of any litigation in the host Member State arising out of underwritten commitments, the insured persons shall not be treated less favourably than if the litigation had been brought against businesses of a conventional type.'

8 Annex III to Directive 2009/138, entitled 'Legal Forms of Undertakings', contains, in each of its parts A to C on the forms of life insurance, non-life insurance and reinsurance undertakings, a point 27 which mentions, with regard to the United Kingdom, the association of underwriters known as Lloyd's.

Italian law

9 The Decreto Legislativo 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 — Code on public works contracts, public service contracts and public supply contracts implementing Directives 2004/17/EC and 2004/18/EC) of 12 April 2006 (Ordinary Supplement to GURI No 100 of 2 May 2006), as amended by Decree-Law No 135 of 25 September 2009 (GURI No 223 of 25 September 2009), converted into law by Law No 166 of 20 November 2009 (GURI No 274 of 24 November 2009) ('Legislative Decree No 163/2006'), governed, in their entirety, the procedures in Italy for the award of public works contracts, public service contracts and public supply contracts.

10 Article 38(1)(m), quater, of that legislative decree provided that tenderers which '… are, in relation to another participant in the same tendering procedure, in a situation of control for the purposes of Article 2359 of the Codice civile (Civil Code), or in any relationship, including a de facto relationship, where the situation of control or relationship means that the tenders are attributable to a single decision-making centre' would be excluded from participation in a procedure for the award of concessions and of public works, supply and service contracts, and could not conclude contracts pertaining thereto or sub-contracts.

11 As regards, in particular, the declarations that candidates or tenderers must submit, Article 38(2) of Legislative Decree No 163/2006 provided:

'For the purposes of paragraph (1)(m), quater, the tenderer shall attach one of the following declarations:

(a) a declaration that it is not in a situation of control for the purposes of Article 2359 of the Civil Code in relation to any person, and that it is submitting the tender independently;

(b) a declaration that it is not aware of the participation in the procedure of persons that are, in relation to the tenderer, in any of the situations of control referred to in Article 2359 of the Civil Code, and that it is submitting the tender independently; or

(c) a declaration that it is not aware of the participation in the procedure of persons that are, in relation to the tenderer, in any of the situations of control referred to in Article 2359 of the Civil Code, and that it is submitting the tender independently.

In the situations described in points (a), (b) and (c), the contracting authority shall exclude those tenderers in respect of which it establishes that the tenders are attributable to a single decision-making centre, on the basis of unambiguous evidence. Verification shall take place and any tenders be excluded after the opening of the envelopes containing the financial bid.'

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

12 On 13 August 2015, Arpacal launched an open tendering procedure for the award of a contract for insurance cover services, with a view to covering risk linked to the agency's civil liability towards third parties and workers for the period covering the years 2016 to 2018. The contract was to be awarded on the basis of the most economically advantageous tender (MEAT) criterion.

13 Amongst others, two Lloyd's syndicates, Arch and Tokio Marine Kiln, participated in the call for tenders. The tenders were both signed by the Special Agent of Lloyd's General Representative for Italy.

14 By decisions of 29 September 2015 and 1 October 2016, Arpacal excluded those two syndicates from the procedure, on the ground of infringement of Article 38(1)(m), quater, of Legislative Decree No 163/2006.

15 Seised by Lloyd's through its General Representative for Italy, the referring court, the Tribunale amministrativo regionale per la Calabria (Regional Administrative Court, Calabria, Italy), censured each of those two decisions by judgments, respectively, of 19 January and 21 November 2016 and ordered, at the end of each judgment, that the two syndicates be readmitted to the tendering procedure.

16 By two decisions adopted on 14 December 2016, Arpacal again excluded the two syndicates from the procedure for infringement of Article 38(1)(m), quater, of Legislative Decree No 163/2006 on the ground that the tenders were objectively attributable to a single decision-making centre, since the technical and economic tenders had been submitted, drafted and signed by one and the same person, namely the Special Agent of Lloyd's General Representative for Italy (hereinafter 'the decisions at issue').

17 Still through its General Representative for Italy, Lloyd's brought fresh proceedings against the decisions at issue before the referring court. In support of those proceedings, Lloyd's submitted that it is a 'collective legal person with multiple structures', forming a recognised grouping of natural and

legal persons (the members) who act independently within individual groups, called syndicates, which operate independently from one another and in competition with one another whilst belonging to the same organisation. It argued that none of the internal structures has autonomous legal personality but acts through the General Representative who, for each country, is the sole representative for all syndicates operating in that territory.

18 Arpacal argued, for its part, that several factors suggest that both tenders are attributable to a single decision-making centre, namely the use of identical forms, the single signature of the same person as the Special Agent of the General Representative for Italy, the fact that the official stamps on both financial tenders bear consecutive numbers and the fact that the statements and declarations are identical. This, it was claimed, resulted in infringement of the principles of the confidentiality of tenders, fair and free competition, and equal treatment of tenderers.

19 The referring court observes that, according to national case-law, where several syndicates of Lloyd's participate in the same call for tenders, the fact that the applications to participate in the tender and the financial tenders of those syndicates are signed by Lloyd's General Representative for Italy entails no infringement either of Article 38(1)(m), quater, and (2) of Legislative Decree No 163/2006, or of the principles of competition, independence and the confidentiality of tenders. That case-law has, in this regard, highlighted the particular structure of Lloyd's which, in accordance with United Kingdom rules and regulations, operates in different countries through a single General Representative. Likewise, in its Opinion No 110 of 9 April 2008, the Autorità di Vigilanza sui Contratti Pubblici (Supervisory Authority for Public Contracts, Italy), which has since become the Autorità Nazionale Anticorruzione (National Anti-Corruption Agency, Italy), stated that the independence of syndicates and competition between them serve to ensure free competition and the equal treatment of candidates.

20 The referring court is uncertain, however, as to whether the Italian legislation at issue, as interpreted by national case-law, complies with EU law. Admittedly, Directive 2009/138 recognises Lloyd's as a particular form of insurance undertaking, the members of which are authorised to operate within the European Union through the intermediary of a single General Representative for the Member State concerned. However, even if the syndicates of Lloyd's operate independently of one another and in competition with one another, the fact remains that tendering procedures are governed by mandatory rules intended to ensure observance of equal treatment. It is certain that, when Lloyd's General Representative signs tenders submitted by syndicates, he is aware of their content. Consequently, the fact that the same person signs several tenders submitted by different tenderers may undermine the independence and confidentiality of those tenders and, as a result, infringe the principle of competition laid down, in particular, in Articles 101 and 102 TFEU.

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

'Do the principles laid down by EU competition rules, as set out in the FEU Treaty, and the principles deriving therefrom, such as the independence and confidentiality of tenders, preclude national legislation, as interpreted by case-law, which allows the simultaneous participation, in the same tendering procedure launched by a contracting authority, of several syndicates of Lloyd's of London, whose tenders are signed by a single person, namely the General Representative for the Member State concerned?'

Consideration of the question referred

22 It should be noted that, in the procedure established by Article 267 TFEU providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to determine the case before it. To that end, the Court may have to reformulate the questions referred to it (see, in particular, judgment of 11 March 2008, *Jager*, C-420/06, EU:C:2008:152, paragraph 46).

23 In this case, the main proceedings concern a public service contract for insurance, in respect of which it is not specified whether the value reaches the threshold set by Directive 2004/18. It should be noted, however, that the award of contracts which, in view of their value, do not fall within the scope of that directive is nonetheless subject to the fundamental rules and the general principles of the FEU Treaty, in particular the principles of equal treatment and of non-discrimination on grounds of nationality and the consequent obligation of transparency, provided that those contracts have certain cross-border interest in the light of certain objective criteria (judgment of 16 April 2015, *Enterprise Focused Solutions*, C-278/14, EU:C:2015:228, paragraph 16).

24 Consequently, it must be considered that, by its question, the referring court is asking, in essence, whether the principles of transparency, equal treatment and non-discrimination, which derive from Articles 49 and 56 TFEU and are referred to in Article 2 of Directive 2004/18, must be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, which does not allow two syndicates of Lloyd's to be excluded from participation in the same procedure for the award of a public service contract for insurance merely because their tenders were each signed by Lloyd's General Representative for that Member State.

25 In this regard, it should be stated at the outset that, while Directive 2004/18 was repealed by Directive 2014/24 with effect from 18 April 2016, it is apparent from settled case-law of the Court that the applicable directive is, as a rule, the one in force when the contracting authority chooses the type of procedure to be followed and decides definitively whether it is necessary for a prior call for competition to be issued for the award of a public contract. Conversely, a directive is not applicable if the period prescribed for its transposition expired after that point in time (see, inter alia, judgment of 14 September 2017, *Casertana Costruzioni*, C-223/16, EU:C:2017:685, paragraph 21).

26 The tendering procedure at issue in the main proceedings was launched on 13 August 2015, whereas Directive 2014/24 was adopted on 26 February 2014 and, in any event, the time period for its transposition expired on 18 April 2016. Consequently, Directive 2004/18 is applicable *ratione temporis* to the main proceedings.

27 It is common ground between all interested persons having submitted written observations that Lloyd's is a recognised grouping of members that are natural and legal persons, which members, whilst acting through individual groups — the syndicates — operate independently from one another and in competition with one another. However, given that none of the internal structures has autonomous legal personality, syndicates may only act through the General Representative, who is the sole representative for each country. Lloyd's also stated that these syndicates constitute neither a fixed structure nor a stable association of members but rather a grouping of members, the composition of which may vary, and that they each operate through a specific management body which issues decisions that are binding on them, although they do not have their own legal personality.

28 It is apparent from the order for reference that although, according to the actual wording of the question referred for a preliminary ruling, the national legislation at issue in the main proceedings allows two syndicates of Lloyd's to participate in the same tendering procedure relating to insurance, even when their tenders have each been signed by Lloyd's General Representative for Italy, the main proceedings follow the adoption of several decisions, including the decisions at issue, whereby Arpacal

excluded those two syndicates from the procedure on the ground, specifically, that as their tenders had each been signed by the Special Agent of that Representative, the latter must have been aware of the content of those tenders.

29 In this regard, it must be noted that Article 45 of Directive 2004/18, which specifies the grounds for the exclusion of an economic operator from participation in a tendering procedure, does not provide for a ground for exclusion such as that at issue in the main proceedings, which is intended to prevent any risk of collusion between entities that are members of the same organisation. The grounds for exclusion provided for in that provision relate only to the professional qualities of the persons concerned (see, to that effect, judgment of 16 December 2008, *Michaniki*, C-213/07, EU:C:2008:731, paragraphs 42 and 43).

30 However, it is clear from the case-law of the Court that Article 45 of Directive 2004/18 does not preclude the option for Member States to maintain or establish, in addition to those grounds for exclusion, substantive rules intended, in particular, to ensure, with regard to public procurement, observance of the principles of equal treatment of all tenderers and of transparency, which constitute the basis of the EU directives on public procurement procedures, provided that the principle of proportionality is observed (judgment of 19 May 2009, *Assitur*, C-538/07, EU:C:2009:317, paragraph 21).

31 It is clear that national legislation such as that at issue in the main proceedings, which is intended to prevent any potential collusion between participants in the same procedure for the award of a public contract, seeks to safeguard the equal treatment of candidates and the transparency of the procedure (see, by analogy, judgment of 19 May 2009, *Assitur*, C-538/07, EU:C:2009:317, paragraph 22).

32 In accordance with the principle of proportionality, which constitutes a general principle of EU law, such legislation must not go beyond what is necessary to achieve the intended objective (see, to that effect, judgments of 19 May 2009, *Assitur*, C-538/07, EU:C:2009:317, paragraphs 23 and 24; of 23 December 2009, *Serrantoni and Consorzio stabile edili*, C-376/08, EU:C:2009:808, paragraph 33; and of 22 October 2015, *Impresa Edilux and SICEF*, C-425/14, EU:C:2015:721, paragraph 29).

33 It should be recalled, in this connection, that the EU rules on public procurement were adopted in pursuance of the establishment of a single market, the purpose of which is to ensure freedom of movement and eliminate restrictions on competition (see, to that effect, judgment of 19 May 2009, *Assitur*, C-538/07, EU:C:2009:317, paragraph 25).

34 In that context, it is the concern of EU law to ensure the widest possible participation by tenderers in a call for tenders (see, to that effect, judgments of 19 May 2009, *Assitur*, C-538/07, EU:C:2009:317, paragraph 26; of 23 December 2009, *Serrantoni and Consorzio stabile edili*, C-376/08, EU:C:2009:808, paragraph 40; and of 22 October 2015, *Impresa Edilux and SICEF*, C-425/14, EU:C:2015:721, paragraph 36).

35 It thus follows, according to settled case-law of the Court, that the automatic exclusion of candidates or tenderers that are in a relationship of control or of association with other competitors goes beyond that which is necessary to prevent collusive behaviour and, as a result, to ensure the application of the principle of equal treatment and compliance with the obligation of transparency (see, to that effect, judgments of 19 May 2009, *Assitur*, C-538/07, EU:C:2009:317, paragraph 28; of 23 December 2009, *Serrantoni and Consorzio stabile edili*, C-376/08, EU:C:2009:808, paragraphs 38 and 40; and of 22 October 2015, *Impresa Edilux and SICEF*, C-425/14, EU:C:2015:721, paragraphs 36 and 38).

36 Such an automatic exclusion constitutes an irrebuttable presumption of mutual interference in the respective tenders, for the same contract, of undertakings linked by a relationship of control or of association. Accordingly, it precludes the possibility for those candidates or tenderers of showing that their tenders are independent and is therefore contrary to the EU interest in ensuring the widest

possible participation by tenderers in a call for tenders (see, to that effect, judgments of 19 May 2009, *Assitur*, C-538/07, EU:C:2009:317, paragraphs 29 and 30; of 23 December 2009, *Serrantoni and Consorzio stabile edili*, C-376/08, EU:C:2009:808, paragraphs 39 and 40; and of 22 October 2015, *Impresa Edilux and SICEF*, C-425/14, EU:C:2015:721, paragraph 36).

37 It should be pointed out in this regard that the Court has already held that groups of undertakings can have different forms and objectives, which do not necessarily preclude controlled undertakings from enjoying a certain autonomy in the conduct of their commercial policy and their economic activities, inter alia, in the area of their participation in the award of public contracts. Relationships between undertakings in the same group may in fact be governed by specific provisions such as to guarantee both independence and confidentiality in the drawing-up of tenders which may be submitted simultaneously by the undertakings in question in the same tendering procedure (judgment of 19 May 2009, *Assitur*, C-538/07, EU:C:2009:317, paragraph 31).

38 Observance of the principle of proportionality therefore requires that the contracting authority be required to examine and assess the facts, in order to determine whether the relationship between two entities has actually influenced the respective content of the tenders submitted in the same tendering procedure, a finding of such influence, in any form, being sufficient for those undertakings to be excluded from the procedure (see, to that effect, judgment of 19 May 2009, *Assitur*, C-538/07, EU:C:2009:317, paragraph 32).

39 As a result, in this case, the mere fact that tenders such as those in the main proceedings have been signed by the same person, namely the Special Agent of Lloyd's General Representative for Italy, cannot justify their automatic exclusion from the tendering procedure at issue.

40 The distinction made in that regard by Arpacal in its written observations, dependent on whether the signature relates to the candidates' applications to participate in the tender procedures or to the financial tenders themselves, is irrelevant. In any event, such a signature, even assuming that it involves the Special Agent and/or Lloyd's General Representative being aware of the content of the tenders, does not prove *per se* that the syndicates consulted one another as to the content of their respective tenders and that, as a result, the relationships between them, together with the involvement of the Special Agent for Lloyd's General Representative, actually influenced those tenders. The same applies to the other factors raised by Arpacal, at paragraph 18 of the present judgment.

41 In taking as their sole basis for excluding the syndicates the fact that the tenders were signed by the Special Agent of Lloyd's General Representative for Italy, the decisions at issue thus presumed there to be collusion, without the syndicates having the possibility of proving that their respective tenders had been drawn up wholly independently of one another.

42 In that regard, it is clear from Directive 2009/138, and in particular from Article 145(2)(c), that the EU law applicable to insurance activities expressly allows Lloyd's to be represented with regard to third parties by a single General Representative for each Member State, in such a way that Lloyd's may exercise its insurance activities in Member States only through the competent General Representative, including in the case of participation in calls for tenders concerning the award of public service contracts for insurance, in the context of which tenders submitted by syndicates must be signed and submitted by the General Representative.

43 In its written observations, Lloyd's stated in this regard, which is a matter to be determined by the referring court, that the General Representative for the Member State concerned confines himself, in accordance with Lloyd's internal procedures, to transmitting on headed paper, without participating in the decision-making process of each syndicate, the content of the model response to a call for tenders and standard forms completed and approved by each syndicate, which, it is argued, guarantees that each syndicate operates in complete autonomy in relation to other syndicates through its own management bodies.

44 In those circumstances, EU law precludes the automatic exclusion of the syndicates of Lloyd's from the call for tenders at issue in the main proceedings merely because their respective tenders were signed by the Special Agent of Lloyd's General Representative for Italy. However, the referring court must be satisfied that the tenders in question were submitted independently by each syndicate.

45 Nevertheless, it must be noted, as the European Commission has submitted in its written observations, that the national legislation at issue in the main proceedings does not appear to allow such an automatic exclusion, but nonetheless allows the contracting authority to exclude tenderers where it finds, on the basis of unambiguous evidence, that their tenders were not drawn up independently, which is a matter that falls to be determined by the referring court.

46 Consequently, the answer to the question referred is that the principles of transparency, equal treatment and non-discrimination which derive from Articles 49 and 56 TFEU and are referred to in Article 2 of Directive 2004/18 must be interpreted as meaning that they do not preclude legislation of a Member State, such as that at issue in the main proceedings, which does not allow two syndicates of Lloyd's of London to be excluded from participation in the same procedure for the award of a public service contract for insurance merely because their respective tenders were each signed by the General Representative of Lloyd's of London for that Member State but instead allows their exclusion if it appears, on the basis of unambiguous evidence, that their tenders were not drawn up independently.

Costs

47 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 (Sixth Chamber) hereby rules:

The principles of transparency, equal treatment and non-discrimination which derive from Articles 49 and 56 TFEU and are referred to in Article 2 of Directive 2004/18/EC of the 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 meaning that they do not preclude legislation of a Member State, such as that at issue in the main proceedings, which does not allow two syndicates of Lloyd's of London to be excluded from participation in the same procedure for the award of a public service contract for insurance merely because their respective tenders were each signed by the General Representative of Lloyd's of London for that Member State, but instead allows their exclusion if it appears, on the basis of unambiguous evidence, that their tenders were not drawn up independently.

[Signatures]