Reports of Cases

OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 13 December 2017 [1]

Case C-9/17

Maria Tirkkonen
intervening party:
Maaseutuvirasto

(Request for a preliminary ruling from the Korkein hallinto-oikeus (Supreme Administrative Court, Finland))

(Reference for a preliminary ruling — Directive 2004/18/EC — Tendering procedure for public contracts for farm advisory services — Whether or not there is a public contract — Scheme for obtaining services under contracts governed by a framework agreement and open to any economic operator who satisfies previously established conditions — Scheme not subsequently open to other economic operators)

1. The support for rural development financed by the European Agriculture Fund for Rural Development (EAFRD) includes aid schemes which are intended to provide advisory services to farmers. The national authorities select the advisors who are to give their professional advice to those farmers by means of procedures which are open, in principle, to all those who satisfy the appropriate requirements for carrying out that task.

2. In one of those selection procedures, Ms Tirkkonen submitted her application to be included in the list of rural advisors, by completing the requisite form. However, she omitted to fill in the point in which she had to indicate whether she accepted the 'conditions of the draft framework agreement', which led the contracting authority to reject her application.

3. According to the order of the reference, that omission could be rectified if the national law governing relations between the public administration and the public were applied. However, if it were governed by the national law on public procurement, it seems that the defect would be irreparable. That, at least, was stated by both the Finnish Administration and the court of first instance which confirmed the decision.

4. In those circumstances, the Korkein hallinto-oikeus (Supreme Administrative Court, Finland) wishes to know, in essence, whether the mechanism for selecting rural advisors which is the subject of the dispute constitutes a 'public contract' within the meaning of Article 1(2)(a) of Directive 2004/18/EC. [2]

1 Original language: Spanish.

2 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).

5. In replying to its doubts, it will be necessary to take account of the case-law, in relation to that concept, of the Court of Justice in the *Falk Pharma* case,[3] which, in my view, provides sufficient guidance for settling the dispute.

I. Law

A. EU law

1. Directive 2004/18

6. Article 1 ('Definitions') provides:

'…

2.

(a) "Public contracts" are contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services within the meaning of this Directive.

…

5. A "framework agreement" is an agreement between one or more contracting authorities and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged.

…'

7. Article 32 ('Framework agreements') states:

'…

2. For the purpose of concluding a framework agreement, contracting authorities shall follow the rules of procedure referred to in this Directive for all phases up to the award of contracts based on that framework agreement. The parties to the framework agreement shall be chosen by applying the award criteria set in accordance with Article 53.

Contracts based on a framework agreement shall be awarded in accordance with the procedures laid down in paragraphs 3 and 4. Those procedures may be applied only between the contracting authorities and the economic operators originally party to the framework agreement.

When awarding contracts based on a framework agreement, the parties may under no circumstances make substantial amendments to the terms laid down in that framework agreement, in particular in the case referred to in paragraph 3.…

3 Judgment of 2 June 2016, *Falk Pharma* (C-410/14, EU:C:2016:399) ('the judgment in *Falk Pharma*').

4. Where a framework agreement is concluded with several economic operators, the latter must be at least three in number, insofar as there is a sufficient number of economic operators that satisfy the selection criteria and/or of admissible tenders that meet the award criteria.Contracts based on framework agreements concluded with several economic operators may be awarded either:

– by application of the terms laid down in the framework agreement without reopening competition, or

– where not all the terms are laid down in the framework agreement, when the parties are again in competition on the basis of the same and, if necessary, more precisely formulated terms, and, where appropriate, other terms referred to in the specifications of the framework agreement, in accordance with the following procedure:

  (a) for every contract to be awarded, contracting authorities shall consult in writing the economic operators capable of performing the contract;

  (b) contracting authorities shall fix a time limit which is sufficiently long to allow tenders for each specific contract to be submitted, taking into account factors such as the complexity of the subject matter of the contract and the time needed to send in tenders;

  (c) tenders shall be submitted in writing, and their content shall remain confidential until the stipulated time limit for reply has expired;

  (d) contracting authorities shall award each contract to the tenderer who has submitted the best tender on the basis of the award criteria set out in the specifications of the framework agreement.'

8. Article 53 ('Contract award criteria') provides:

'1. Without prejudice to national laws, regulations or administrative provisions concerning the remuneration of certain services, the criteria on which the contracting authorities shall base the award of public contracts shall be either:

  (a) when the award is made to the most economically advantageous tender from the point of view of the contracting authority, various criteria linked to the subject matter of the contract in question: for example, quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost-effectiveness, after-sales service and technical assistance, delivery date and delivery period or period of completion, or

  (b) the lowest price only.

2. Without prejudice to the provisions of the third subparagraph, in the case referred to in paragraph 1(a) the contracting authority shall specify in the contract notice or in the contract documents or, in the case of a competitive dialogue, in the descriptive document, the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender.

The weightings can be expressed by providing for a range with an appropriate maximum spread.

Where, in the opinion of the contracting authority, weighting is not possible for demonstrable reasons, the contracting authority shall indicate in the contract notice or contract documents or, in the case of a competitive dialogue, in the descriptive document, the criteria in descending order of importance.'

2. Regulation (EU) No 1305/2013[4]

9. Article 15(3) provides:

'The authorities or bodies selected to provide advice shall have the appropriate resources in the form of regularly trained and qualified staff and advisory experience and reliability with respect to the fields in which they advise. The beneficiaries under this measure shall be chosen through calls for tenders. The selection procedure shall be governed by public procurement law and shall be open to both public and private bodies. It shall be objective and shall exclude candidates with conflicts of interest.

…'

3. Implementing Regulation (EU) No 808/2014[5]

10. Article 7 provides:

'The calls for tenders referred to in Article 15(3) of Regulation (EU) No 1305/2013 shall follow the applicable Union and national public procurement rules. They shall give due consideration to the degree of attainment by the applicants of the qualifications referred to in that Article.'

B. National law

11. Directive 2004/18 was transposed in Finland by the Law on public procurement (Law 348/2007).

12. Under Article 45(1) of the Law on the implementation of agricultural aid (Law 192/2003, as amended by Law 501/2014), advisors are selected in compliance with the provisions of the Law on public procurement and for a period ending on the expiry of the 2014-2020 Rural Development Programme for Mainland Finland.

13. Under Article 45(2), a condition of selection and admittance is that the advisor has adequate expertise in terms of the status and scope of the advisory task. He must also satisfy the conditions as to capability.

II. The facts

14. On 16 September 2014, the Maaseutuvirasto (Finnish Agency for Rural Affairs, 'the Agency') issued an invitation to tender for farm advisory services for the period 2015-2020 to be carried out as a framework agreement in an open procedure.

15. It was stated in the contract notice that the procedure was open to public and private advisors and that its aim was to have service providers who satisfied the conditions of Article 15(3) of Regulation No 1305/2013 and Article 13(1) of Regulation (EU) No 1306/2013,[6] and who also had advisory experience.

4 Regulation (EU) No 1305/2013 of the European Parliament and of the Council of 17 December 2013 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) and repealing Council Regulation (EC) No 1698/2005 (OJ 2013 L 347, p. 487).

5 Commission Regulation 17 July 2014 laying down rules for the application of Regulation (EU) No 1305/2013 of the European Parliament and of the Council on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) (OJ 2014 L 227, p. 18).

6 Regulation of the European Parliament and of the Council of 17 December 2013 on the financing, management and monitoring of the common agricultural policy and repealing Council Regulations (EC) No 352/78, (EC) No 165/94, (EC) No 2799/98, (EC) No 814/2000, (EC) No 1290/2005 and (EC) No 485/2008 (OJ 2013 L 347, p. 549).

16. The system of selection was based on a framework agreement, in accordance with the public procurement law, in such a way that the service providers would be included in the agreement under an open procedure pursuant to Article 65 of that law.

17. The framework agreement set out the principal conditions for provision of the service. The subsequent contracts were awarded without a specific award procedure, in such a way as to permit the farmer/land user entitled to advisory services to obtain them from the person whom he considered would best fulfil his needs. In principle, advisors in nearby areas were called upon to provide services, but on proper grounds other advisors could also be used.

18. The advisors were to be paid an hourly rate by the Agency (not including VAT, which would be paid by the farmer who received the services).

19. Having regard to the need for the advisory service, all the advisors who met the conditions as to capability and the minimum requirements laid down in the annexes to the framework agreement would be selected. In addition, the candidates had to pass a separate examination, as part of the selection procedure.

20. By the decision of 18 December 2014, the Agency excluded the application submitted by Ms Tirkkonen, on the ground that she had not filled in Point 7 of the tender form entitled 'Observance of the formal requirements of the bid and compliance with tender conditions' (Annex 2 to the tender). In that paragraph, she should have indicated, by marking 'yes' or 'no', whether she 'accepted the tender conditions of the draft framework agreement appended to the tender'.

21. Ms Tirkkonen challenged the Agency's decision before the Markkinaoikeus (Market Court, Finland), maintaining that the procedure did not concern the award of a public contract. Accordingly, public procurement law was not applicable, but rather administrative law, which required the Agency to request her to complete her documentation.

22. Following the dismissal of her action, on 7 September 2015, by the Markkinaoikeus (Market Court), Ms Tirkkonen brought an appeal before the Korkein hallinto-oikeus (Supreme Administrative Court), which raises the question for a preliminary ruling.

23. According to the order for reference, the issue is whether 'the scheme of the [Agency] concerning an advisory service is a public contract falling within the scope of Procurement Directive 2004/18 and thus also of national public procurement law'.[7]

III. The question referred

24. The question referred is worded as follows:

'Is Article 1(2)(a) of Procurement Directive 2004/18/EC to be interpreted as meaning that the definition of 'public contract' within the meaning of that directive encompasses a scheme

– by which a public body seeks to obtain services in the market for a contractual period limited in advance by entering into contracts, subject to the conditions of a draft framework agreement annexed to the invitation to tender, with all economic operators who meet the individual

7 The national court points out that the purpose of the reference is not to assess whether the Agency 'proceeded in the manner prescribed in the procurement legislation' (paragraph 8 of the order for reference). In any event, it might be of interest to note that, if Directive 2004/18 were applicable, it may be inferred that the awarding authority may allow, in a procurement procedure, the rectification of formal irregularities which do not amount to the submission of a new tender or significantly amend the terms of the original tender. I refer, on this point, to my Opinion in *M.A.T.I. SUD* and *DUEMMESGR*, (C-523/16 and C-536/16 EU:C:2017:868).

requirements laid down in the tender documents in regard to the suitability of the service provider and to the service offered, and pass an examination more particularly described in the invitation to tender, and

– which can no longer be joined during the validity period of the contract?'

IV. Proceedings before the Court of Justice and position of the parties

25. The reference for a preliminary ruling was lodged at the Court Registry on 9 January 2017. Written observations have been submitted by Ms Tirkkonen, the Finnish Government and the Commission. It has not been considered necessary to hold an oral hearing.

26. Ms Tirkkonen maintains that, of the three stages of any tendering procedure (verification of the capability of the tenderers; evaluation of compliance of the tenders with the tender notice; selection of the tender on the basis of the criterion of the lowest price or cost-effectiveness), in this procedure the third has not been carried out, since the tenders were not compared with each other and it was for the farmer to select the service provider. In particular, she points out that the 140 advisors initially chosen took the examination and that 138 passed it, without that examination actually making it possible to classify them in order of merit. The lack of selection between the tenders received precludes the existence of a public contract.

27. The Finnish Government stresses the relevance of the case-law laid down in the judgment in *Falk Pharma*, but points out that, in this case, the scheme is not permanently open to new tenderers. It is of the opinion that the fact that the awarding authority 'imposes on service providers numerous specific requirements which are based on legislation'[8] brings that scheme close to the concept of a public contract. Application of the legislation on public contracts would be justified by the need to ensure that the selection criteria are not fixed in a discriminatory manner.

28. The Finnish Government claims, furthermore, that of the 163 tenders received only 140 were conditionally admitted, and 138 finally accepted. This demonstrates the selective nature of the procedure and the intention of the awarding authority to accept only the best tenders, and also the dissuasive nature of the conditions imposed on tenderers.

29. Finally, for the Finnish Government, the six-year period of validity of the scheme means that, during that time, new advisors may not be admitted, which differentiates the disputed procedure from a mere licensing system.

30. The Commission believes that the specific requirements of the tender notice concerning the suitability of the tenderer and the service, as set out by the referring court, do not constitute an award criterion but merely a selection criterion.

31. The Commission takes the view that the procedure contained no award criteria and the Agency could neither exclude nor reject a competent advisor chosen by a farmer. In short, only selection criteria were used in the procedure.

32. In those circumstances, the Commission maintains that the case is similar to that resolved in the judgment in *Falk Pharma*, the case-law of which has been confirmed by Directive 2014/14/EU.[9] In its view, it is immaterial that the scheme is not open permanently to interested parties, since the lack of selection is a sufficient reason for ruling out classification as a public contract.

8 Paragraph 22 of the written observations.

9 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).

V. Assessment

33. According to the referring court, the Finnish Administration has implemented a programme based on Regulation No 1305/2013, Article 15(3) of which states that the selection procedure is to be governed by public procurement law. Therefore the question referred for a preliminary ruling must be answered on the basis of the legislation concerning public contracts.

34. I think that that reference to public procurement law must be interpreted as meaning that the procedure for selecting farm advisors must comply with the principles (of non-discrimination, equal treatment and transparency) which govern that section of the legal code. It is not, in my view, a requirement which involves adhering to each and every one of the provisions of the EU directives on procurement by public bodies.

35. Specifically, the referring court wishes to know whether a scheme such as that at issue in the present case falls 'within the scope of Procurement Directive 2004/18'. I should point out that the purpose of the scheme is to have an indefinite number of persons to provide farm advisory services to farmers, selecting them by means of a procedure, subject to the conditions contained in a framework agreement, in which all those who satisfy the conditions laid down in the tender documents and pass an examination may participate. The scheme is applicable for a limited period, during which no new advisors may join.

36. From the information provided by the referring court it is apparent, as the Commission points out,[10] that, at first sight, the characteristics of contracts as defined by Article 1(2)(a) of Directive 2004/18 would seem to be present. It is, in fact, a contract governed by a framework agreement, concluded in writing between an economic operator (the advisor) and a contracting authority (the Agency), the object of which is the provision of services for pecuniary interest. The latter point is particularly clear since, according to the referring court,[11] the advisory services are, of course, of benefit to the farmer who receives them, but also to the Agency which pays for them and on whose behalf they are provided, as part of its administrative powers.

37. However, it should not be forgotten that, for the Court of Justice, 'the choice of the tender and, thus, of a successful tenderer, is intrinsically linked to the regulation of public contracts by [Directive 2004/18] and, consequently, to the concept of "public contract" within the meaning of Article 1(2) of that directive'.[12]

38. I do not consider that this approach taken in the judgment in *Falk Pharma* is excessively reductionist. It is sought to indicate that, ultimately, in public contracts subject to Directive 2004/18, there must be a final successful tenderer, who is preferred to all his competitors on the basis of the qualities of his tender. This is a key element which is applicable 'for every contract, framework agreement, and the establishment of any dynamic purchasing system', in respect of which 'the contracting authorities are to draw up a written report which is to include *the name of the successful tenderer and the reasons why his tender was selected*' [Article 43, first paragraph, (e) of Directive 2004/18; emphasis added].[13]

39. In my view, in the scheme at issue it is not possible to identify the existence of *criteria for the award* of advisory service contracts, but only *criteria for the selection* of economic operators capable of offering those services.

10 Paragraphs 27 and 28 of the Commission's written observations.

11 Paragraph 56 of the order for reference: 'it may be assumed that the service relating to the provision of the services at issue is of immediate economic benefit to the Maaseutuvirasto'.

12 Judgment in *Falk Pharma*, paragraph 38.

13 Ibid., paragraph 39.

40. As Advocate General Wathelet pointed out in the Opinion in *Ambisig*,[14] the Court of Justice has been careful to distinguish two kinds of criteria. 'The examination of the suitability of contractors to perform the contracts to be awarded' and 'the award of the contract' are two different operations. 'Whilst selection of a tenderer concerns its personal situation and its ability to engage in the professional activity in question, the contract is awarded to the tenderer which submitted the tender that is most economically advantageous from the point of view of the contracting authority (Article 53(1)(a) of Directive 2004/18) or which offers the lowest price (Article 53(1)(b))'.

41. In other words, while the aim of the *selection* criteria is to assess the *tenderers* according to their suitability, the aim of the award criteria is to *identify* and choose the most advantageous *tender* of those submitted by the various tenderers. As the objective is 'the opening-up of public procurement to competition',[15] economic operators must compete with each other, as rivals, to provide the service.

42. I consider that, from that point of view, a key element is the assertion of the referring court that 'the invitation to tender lays down no award criteria on the basis of which the tenders submitted could be compared with each other, and the [Agency] did not award points to the tenders or make a comparison of them', but that 'all tenderers satisfying the requirements of the invitation to tender concerning inter alia training and professional experience were admitted to the framework agreement, provided that they passed the examination more particularly described in the invitation to tender'.[16]

43. The Finnish Government maintains that the admission criteria did indeed make the procedure selective in nature. Firstly, the fact that they were made public in advance could have dissuaded interested persons who thought that they did not satisfy those criteria to refrain from submitting a tender. Secondly, the conditions were so strict that not everybody could fulfil them, so that the procedure was in fact restricted to a 'selected group'.[17] Therefore, according to the Finnish Government, the selective nature of the procedure makes it essential that the criteria which confer that quality are not established in a discriminatory manner, which would lead to the application of public procurement legislation.

44. There is no doubt that to impose conditions of skill and merit for entry to the scheme at issue involves a certain selection mechanism. However, what is decisive, as regards contracts subject to Directive 2004/18, is not confirmation that the tenderers are capable of providing the advisory service (selection criterion), but the differences between the tenders of those tenderers, once their capability has been established, with the aim of making the final selection of the person or persons to whom that provision will be assigned (award criterion).

45. Of course, the conditions for access to the farm advisory scheme based on technical capacity (including the passing of an examination) make it possible to select candidates by reference to a pre-established threshold. However, the relevant selection, for the purposes of the concept of public contracts in Directive 2004/18, is that which results from comparing the capabilities and merits of the tenders of the different candidates. That is to say, the crucial point is the final *award*, by comparison or by weighing up differences, to the best tender, not the initial *selection* made in relation to a threshold which may be passed with no competition whatsoever between the candidates.

14 Case C-601/13, EU:C:2014:2474, points 17 and 19.

15 Recital 2 of Directive 2004/18.

16 Order for reference, paragraph 59.

17 Paragraph 38 of the observations of the Finnish Government. It points out that, of a total of 163 tenders, 140 were admitted provisionally and 138 definitively, which was 85% of the candidates.

46. The referring court mentions the *Ambisig* case,[18] in which it was held that it is the abilities and experience of the members of a team which is to perform a contract concerning training and advisory services which are 'decisive for the evaluation of the professional quality of the team' and that 'that quality may be an intrinsic characteristic of the tender and linked to the subject matter of the contract for the purposes of Article 53(1)(a) of Directive 2004/18',[19] so that 'that quality may be included as an award criterion in the contract notice or in the relevant tendering specifications'.[20]

47. However, that statement of the Court of Justice was made in a context in which the contracting authority chose one of the competing tenderers and excluded another, rightly using as a criterion the quality of their respective teams.

48. In the present case, on the contrary, the referring court assures us that the Agency did not limit *ab initio* the number of possible service providers,[21] or compare the tenders or make a final selection of one or more, on the basis of a comparative assessment of their respective contents, to the exclusion of the others.[22]

49. This, therefore, is a situation in which the case-law laid down in the *Falk Pharma* case is applicable, namely, that 'where a public entity seeks to conclude supply contracts with all the economic operators wishing to supply the goods concerned in accordance with the conditions specified by that entity, the fact that the contracting authority does not designate an economic operator to whom contractual exclusivity is to be awarded means that there is no need to control, through the detailed rules of Directive 2004/18, the action of that contracting authority so as to prevent it from awarding the contract in favour of national operators'.[23]

50. Both the Finnish Government[24] and the referring court agree that the case-law to which reference has just been made is relevant to the present case. Their only doubt, which in the case of Korkein hallinto-oikeus (Supreme Administrative Court) appears to be that which has led it to make the reference for a preliminary ruling,[25] is that, unlike what happened in the judgment in *Falk Pharma*, the scheme designed by the Agency is not permanently open to all interested economic operators during its period of validity.

51. It is true that, strictly speaking, by limiting the procurement scheme, during its period of validity, to the economic operators initially admitted by the Agency (which precludes the subsequent access of other advisors) a second quantitative restriction is imposed. However, this is only the consequence of the clear and strict temporal restriction of the advisory aid scheme and of the 2014-2020 Rural Development Programme for Mainland Finland.

18 Judgment of 26 March 2015 (C-601/13, EU:C:2015:204).

19 Ibid., paragraph 33.

20 Ibid., paragraph 34.

21 According to the referring court, the Agency stated that 'as big a group of service providers as possible is needed to ensure that the users of services reliably receive the service they need' (paragraph 50 of the order for reference).

22 Furthermore, the *final* selection of the person who is to provide the service, in each case, is not made by the Agency, but by the farmers who join the consultancy scheme. They may choose the advisor who is best suited to their needs, choosing as a rule those who offer their advice in the local area, although other advisors may be used in justified cases. See, to that effect, paragraph 14 of the order for reference.

23 As the Court of Justice pointed out in paragraph 35 of that judgment, 'the purpose of Directive 2004/18 is to avoid the risk of preference being given to national tenderers or applicants whenever a contract is awarded by contracting authorities'. A risk which, it was then said (paragraph 36), 'is closely connected to the selection which the contracting authority intends to make from the admissible tenders and to the exclusivity which will result from the award of the contract concerned to the operator whose tender has been accepted or to the economic operators whose tenders have been accepted, in the case of a framework agreement, that constituting the objective of the public procurement procedure'.

24 According to the Finnish Government, that factor distinguishes this procedure from a mere licensing system and brings it closer to the status of 'public contract' within the meaning of Directive 2004/18.

25 For the referring court, the doubt lies in deciding 'whether it follows from the … characteristic of the scheme being closed to other operators that it may be a public contract for the purposes of Article 1(2)(a) of the Procurement Directive' (order for reference, paragraph 63).

52. Furthermore, the reference of the Court of Justice in the judgment in *Falk Pharma* to the permanent availability of the contractual scheme to new tenderers was not, in my view, the *ratio decidendi* of that judgment, but a statement made for the sake of completeness. The key issue, therefore, was that the contracting authority had not awarded the contract exclusively to one of the tenderers. [26]

53. In the present case, as in the *Falk Pharma* case, there has also been no element of genuine competition between candidates, in order to assess which of the tenders is the best and at the same time to reject the others.

54. Furthermore, as the Court of Justice pointed out in the *Falk Pharma* judgment, [27] that essential element is expressly set out in the definition of the concept of 'procurement' in Directive 2014/24, and the fact that it is not applicable to the case *ratione temporis* does not render it unworthy of mention, if only because it expresses the intention of the legislature to state explicitly a feature of public contracts which, according to the Court, is intrinsic to its nature. [28]

55. The importance, both positive and negative, of that factor is clearly demonstrated when, in recital 4 of Directive 2014/24, it is stated that situations where all operators fulfilling certain conditions are entitled to perform a given task, without any selectivity, 'should not be understood as being procurement'.

VI. Conclusion

56. In the light of the foregoing, I propose that the Court of Justice reply as follows to the Korkein hallinto-oikeus (Supreme Administrative Court, Finland):

Article 1(2)(a) 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, is to be interpreted as meaning that a system for selecting providers of farm advisory services such as that which is the subject matter of the main proceedings, by which a public body admits all economic operators fulfilling the conditions of suitability and pass an examination, without awarding provision of the service exclusively to one or more of those advisors in a competitive procedure, does not constitute a public contract within the meaning of that directive. It is irrelevant for this purpose that the scheme has a limited period of validity, during which other advisors are not admitted.

26 Judgment in *Falk Pharma*, paragraph 38.

27 Ibid., paragraph 40.

28 Under Article 1(2) of Directive 2014/24, 'procurement … is the acquisition by means of a public contract of works, supplies or services by one or more contracting authorities from economic operators *chosen* by those contracting authorities, whether or not the works, supplies or services are intended for a public purpose'. (Emphasis added).