

**Case C-219/19**

**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice**

**Date lodged:**

11 March 2019

**Referring court:**

Tribunale Amministrativo Regionale per il Lazio (Lazio Regional Administrative Court, Italy)

**Date of the decision to refer:**

16 January 2019

**Applicant:**

Parsec Fondazione Parco delle Scienze e della Cultura

**Defendants:**

Ministero delle Infrastrutture e dei Trasporti

Autorità nazionale anticorruzione (ANAC)

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**Subject of the action in the main proceedings**

Action for annulment of the measure by which the applicant foundation, Parsec Fondazione Parco delle Scienze e della Cultura (or ‘the Foundation’), was refused inclusion in the national list of persons able to take part in tendering procedures for the award, by local authorities, of services relating to seismology and classification of territory according to seismic risk, services that fall into the category of ‘architectural and engineering services’.

**Subject matter and legal basis of the reference**

Whether a national provision that limits the economic operators able to take part in tendering procedures for the award of certain services (in this case, ‘architectural and engineering services’), on the basis of their legal form (in this case, exclusion of non-profit bodies and those that are not established in certain company forms), is compatible with Directive 2014/24/EU.

Article 267(2) TFEU.

### **Question referred**

‘Does recital 14 in conjunction with Articles 19(1) and 80(2) of Directive 2014/24/EU preclude a legal provision such as Article 46 of Legislative Decree No 50 of 18 April 2016, by which Italy transposed Directives 2014/23/EU, 2014/24/EU and 2014/25/EU into national law, which permits only economic operators created in the legal forms indicated in that provision to take part in tendering procedures for the award of ‘architectural and engineering services’, which has the effect of excluding from participation in such procedures economic operators that perform such services using a different legal form?’

### **Provisions of EU law relied on**

Recital 14; Article 19(1) and Article 80(2) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC.

### **Provisions of national law relied on**

Decreto Legislativo del 18 aprile 2016, n. 50 – Codice dei contratti pubblici (Legislative Decree No 50 of 18 April 2016 – Public Procurement Code)

- Article 3(1)(p), which defines an ‘economic operator’ as any natural or legal person or public entity or group of such persons or entities, including any temporary association of undertakings, or entity without legal personality, including a European economic interest group (EEIG), which offers the execution of works and/or a work, the supply of products or the provision of services on the market.

- Article 3(1)(vvvv), which defines as ‘architectural and engineering services and other technical services’ the services reserved for economic operators performing a regulated profession in accordance with Article 3 of Directive 2005/36/EC.

- Article 45(1), according to which: ‘Participation in public procurement procedures is open to the economic operators listed in Article 3(1)(p), and economic operators established in other Member States created in accordance with the legislation applicable in their respective countries. Economic operators and groups of economic operators, including temporary associations of such groups, that are authorised to perform the services covered by the procurement procedure on the basis of the legislation of the Member State in which they are established, may take part in public procurement procedures even in the case that they should have been set up as natural or legal persons, in accordance with this Code’.

- Article 46(1), according to which participation in procedures for the award of architectural and engineering services is open to the following:

- sole traders or groups of such individuals, companies of professionals in the form of partnerships or cooperatives, engineering companies, in the form of limited companies, consortia, EEIGs, and temporary groups of the abovementioned forms, which provide public and private customers operating on the market with engineering and architectural services and associated technical and administrative activities;
- providers of engineering and architectural services identified using CPV codes from 74200000-1 to 74276400-8 and from 74310000-5 to 74323100-0 and 74874000-6 established in other Member States, created in accordance with the legislation applicable in their respective countries;
- temporary groups made up of the abovementioned types of individuals and structures.

- Articles 3 and 6 of Decreto del Ministro delle Infrastrutture e Trasporti n. 263 del 2 dicembre 2016 (Decree No 263 of the Ministry of Infrastructure and Transport of 2 December 2016), on the requirements for being included in the national list of persons that are able to take part in tendering procedures for award of architectural and engineering services.

### **Succinct presentation of the facts and the main proceedings**

- 1 The applicant is a foundation — a non-profit private law body — which, using highly qualified personnel, manages a seismology observatory for the detection of seismic activity and performs functions associated with territorial zoning and the prevention of seismic risk, in cooperation with the Istituto Nazionale di Geofisica e Vulcanologia (National Institute of Geophysics and Volcanology, INGV) and certain universities, and works with various local bodies.
- 2 On 25 January 2018, wishing to take part in public procurement procedures for the award of territorial seismic zoning services, the Foundation asked the Autorità Nazionale Anticorruzione (National Anti-Corruption Authority, ‘the ANAC’) to include it in the national list of persons eligible to take part in tendering procedures for the award of ‘architectural and engineering services’, a category covering the activities performed by the Foundation.
- 3 By a measure of 15 February 2018, the ANAC refused the request, declaring that the applicant, as a non-profit foundation, does not fall within the concept of ‘economic operators’ that can be awarded contracts for architectural and engineering services in accordance with Article 46(1) of Legislative Decree No 50/2016 and Article 6 of Ministerial Decree No 263/2016.

- 4 The applicant challenged that measure before the referring court, contending that the Italian legislation did not comply with EU law.

### **Succinct presentation of the reasons for the request for a preliminary ruling**

- 5 The referring court notes first, in general terms, that the Court of Justice has made the following findings in relation to the concept of ‘economic operator’ for the purposes of the award of public procurement contracts:
  - ‘the provisions of Directive 2004/18 [now replaced by Directive 2014/24/EU], in particular those in Article 1(2)(a) and (8), first and second subparagraphs, which refer to the concept of “economic operator”, must be interpreted as permitting entities which are primarily non-profit-making and do not have the organisational structure of an undertaking or a regular presence on the market – such as universities and research institutes and consortia made up of universities and public authorities – to take part in a public tendering procedure for the award of a service contract’ (paragraph 45 of the judgment of 23 December 2009, Case C-305/08, EU:C:2009:807);
  - ‘Directive 2004/18 must be construed as precluding an interpretation of national legislation, such as that at issue in the main proceedings, which prohibits entities, such as universities and research institutes, which are primarily non-profit-making, from taking part in a procedure for the award of a public contract, even though such entities are entitled under national law to offer the services covered by the contract in question’ (paragraph 51, *ibid.*).
- 6 Those principles have been transposed by the Italian legislature in Article 45 of Legislative Decree No 50/2016, which lays down a broad general definition of ‘economic operator’. In abstract terms, that definition can, per se, include non-profit organisations such as the applicant.
- 7 However, Article 46 of that legislative decree states that tendering procedures for the award of architectural and engineering services are open only to professionals and natural persons enrolled on the relevant professional registers, engineering companies or companies created by such professionals, without prejudice to the fact that the latter must be profit-making companies created in accordance with Book V of the Italian Civil Code, or European economic interest groups (EEIGs), temporary groups or stable consortia, provided that they are constituted from among the abovementioned engineering companies or companies regulated by Book V of the Italian Civil Code.
- 8 Such a legislative context formally excludes participation in the tendering procedures in question by non-profit bodies, such as foundations, governed by Book I of the Civil Code. That exclusion is confirmed by Ministerial Decree No 263/2016, which, in regulating the conditions and requirements for being included in the national list of persons that are able to take part in tendering procedures for

architectural and engineering services, indicates only those persons listed in Article 46 of Legislative Decree No 50/2016.

- 9 The referring court notes that the Italian legislature has thus created ‘special rules’ for procurement contracts of this type, characterised by a concept of ‘economic operator’ (potential tenderer) that is narrower than the concept generally valid in relation to procurement contracts.
- 10 That said, the referring court asks whether the principle stated by the Court of Justice in the judgment in Case C-305/08, transposed into the general Italian legislation, must be applied automatically or whether, on the contrary, an exemption can be applied in certain specific cases.
- 11 In that regard, the referring court notes, first, that the literal wording of Article 19(1) and Article 80(2) of Directive 2014/24/EU (Article 80(2) relating to the award of design services) seems, even if only by implication, to allow the Member States to limit participation in tendering procedures solely to natural persons and certain legal persons. This is without prejudice to the fact that, in such a case, a foreign economic operator, authorised in its own country to perform, in a different legal form, the service covered by the tendering procedure, must in any case be permitted to take part in that procedure.
- 12 Secondly, the referring court emphasises that the limitation imposed by the Italian legislature, on which the main proceedings turn, can be justified by the sensitivity of the services in question, the significant degree of professionalism required to guarantee the quality of those services and the presumption that the persons carrying out those services on a continuous professional basis, subject to remuneration, are more reliable because of the continuity of their activities and the constant updating of their professional expertise.
- 13 Thirdly, in terms of the existence of a cross-border interest for the purposes of referral to the Court, the referring court notes that it is undoubtedly true that economic operators originating in another Member State can take part in tendering procedures for the award of the services in question even if they do not have one of the legal forms listed in Article 46 of Legislative Decree No 50/2016. This right exists on the basis of the general clause in Article 45 of that legislative decree, according to which *‘economic operators and groups of economic operators, including temporary associations of such groups, that are authorised to provide the service covered by the procurement procedure on the basis of the legislation of the Member State in which they are established, may take part in public procurement procedures even in the case that they should have been set up as natural or legal persons, in accordance with this Code’*.
- 14 However, it should be considered, on the one hand, that foreign economic operators could feel obliged, in order to be involved in tendering procedures of this type conducted by an Italian contracting authority, to set up in advance in Italy, taking one of the legal forms indicated in Article 46. On the other hand, the

exclusion of certain national economic operators from tendering procedures could have a distortive effect on competition, in relation to a type of service that is also of significant interest for foreign economic operators. This is all the more so if it is considered that the amount above which the competition procedure assumes European relevance is relatively modest (varying from EUR 135 000.00 to EUR 209 000.00, depending on whether or not the contracting authority is part of central government).

- 15 Moreover, even in the case examined by the Court in the abovementioned judgment in Case C-305/08, the Italian provision being disputed (Article 34 of Legislative Decree No 163/2006) did not impose any limitation on participation by foreign economic operators, provided that they are created in accordance with the legislation of their State of origin. That provision in fact only precluded Italian economic operators created in forms different from those indicated by the legislation from taking part in tendering procedures for award of public procurement contracts. The Court held, *inter alia*, that the amount payable for the services covered by the tendering procedure was not relevant for the purposes of determining whether it had jurisdiction to rule on the question referred, given that it was not even mentioned in the judgment.
- 16 Fourth and lastly, in terms of the relevance of the question referred, the referring court notes that, since the measure being challenged is based on limitation *ex lege* of the persons eligible for inclusion in the national list of operators able to take part in tendering procedures for the award of architectural and engineering services, it is crucial to know whether that limitation is compatible with EU law, as the referring court asserts, or whether it is not. If it is not compatible, the referring court must annul the measure being challenged, and the applicant must be included in the relevant list.