Case C-561/19

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:

23 July 2019

Referring court:

Consiglio di Stato (Italy)

Date of the decision to refer:

15 November 2018

Appellants:

Consorzio Italian Management

Catania Multiservizi SpA

Respondent:

Rete Ferroviaria Italiana SpA

Subject-matter of the main proceedings

Appeal brought by Consorzio Italian Management and Catania Multiservizi SpA against Judgment No 433/2014, delivered by the Tribunale amministrativo regionale per la Sardegna (Regional Administrative Court, Sardinia, 'the TAR'), dismissing the action brought by the present appellants against the memorandum of 22 February 2012 of Rete ferroviaria italiana SpA, in which that company stated that it regarded as unjustified and not allowable the request for an upward adjustment of the contract price on account of an alleged increase in contractual costs arising from an increase in staff costs.

Subject-matter and legal basis of the request for a preliminary ruling

The question of whether it is mandatory to request a preliminary ruling of the Court of Justice, pursuant to the third paragraph of Article 267 TFEU, whenever, and at whatever stage of the proceedings, a party to the proceedings submits to a

national court of last instance a preliminary question on the compatibility of national law with EU law, or

whether it is mandatory to make a reference for a preliminary ruling, at the request of a party to the proceedings, only in respect of questions which the parties propose in their initial pleading, or up to the last pleading which they are permitted to lodge before the case is set down for judgment, and in no event once a reference has already been made to the Court of Justice for a preliminary ruling.

The question whether Articles 115, 206 and 217 of Legislative Decree No 163/2006, as interpreted in administrative case-law, are consistent with EU law in so far as they exclude price review in the case of contracts relating to 'special sectors' and, in particular, in the case of contracts that have a different object from those to which Directive 2004/17 refers but are functionally linked to one of those objects.

Questions referred

1. In accordance with Article 267 TFEU, is a national court whose decisions are not amenable to appeal required, in principle, to make a reference for a preliminary ruling on a question concerning the interpretation of EU law even where the question is submitted to it by one of the parties to the proceedings after that party has lodged its initial pleading, or even after the case has been set down for judgment for the first time, or indeed even after a reference has already been made to the Court of Justice of the European Union for a preliminary ruling?

2. Regard being had to the first question, are Articles 115, 206 and 217 of Legislative Decree No 163/2006, as interpreted by national administrative case-law, in so far as they exclude price review in the case of contracts relating to 'special sectors' and, in particular, in the case of contracts that have a different object from those to which Directive 2004/17/EC refers but are functionally linked to one of those objects, consistent with EU law (in particular, Articles 4(2), 9, 101(1)(e), 106, 151, 152, 153 and 156 TFUE, the European Social Charter signed at Turin on 18 October 1961 and the 1989 Community Charter of the Fundamental Social Rights of Workers, referred to in Article 151 TFEU, Articles 2 and 3 TEU and Article 28 of the Charter of Fundamental Rights of the European Union)?

3. Regard being had to the first question, are Articles 115, 206 and 217 of Legislative Decree No 163/2006, as interpreted by national administrative case-law, in so far as they exclude price review in the case of contracts relating to 'special sectors' and, in particular, in the case of contracts that have a different object from those to which Directive 2004/17/EC refers but are functionally linked to one of those objects, consistent with EU law (in particular, Article 28 of the Charter of Fundamental Rights of the European Union, the principle of equal treatment enshrined in Articles 26 and 34 TFEU, and the principle of freedom to

conduct a business enshrined in Article 16 of the Charter of Fundamental Rights of the European Union)?

Provisions of EU law cited

TFEU, in particular, Articles 4(2), 9, 26, 34, 101(1)(e), 106, 151 152, 153, 156 and the third paragraph of Article 267

TEU, in particular, Articles 2 and 3

Charter of Fundamental Rights of the European Union, in particular, Articles 16 and 28

Directive 2004/17/EC

Provisions of national law cited

Decreto legislativo n. 163/2006 (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 of 2006 (establishing the Code on public works contracts, public service contracts and public supply contracts pursuant to Directives 2004/17/EC and 2004/18/EC) 'Legislative Decree No 163/2006'), in particular, Articles 115, 206, 210 and 217

Facts and procedure

1 The present appeal concerns the same judgment of the TAR, Judgment No 433/2014, as gave rise to the order for reference to the Court of Justice which led to the Court's judgment of 19 April 2018 in Case C-152/17. However, the appellants have put to the referring court further questions for a preliminary ruling that the referring court considers it must, in part, refer to the Court of Justice. In addition, the referring court itself raises a question for a preliminary ruling, concerning its obligation to make a further reference for a preliminary ruling, in light of a question put forward *ex novo* by the appellants.

2 Consorzio Italian Management and the company Catania Multiservizi SpA., each on their own behalf and, the former, also as the lead company of the joint venture that comprises the two entities, have appealed against Judgment No 433 of 11 June 2014, by which the TAR dismissed the action brought against the memorandum of 22 February 2012 of Rete ferroviaria italiana SpA ('RFI').

3 In that memorandum, RFI had stated that it regarded as unjustified and not allowable the request for an upward adjustment of the contract price on account of an alleged increase in contractual costs arising from an increase in staff costs.

4 The contract under consideration is the contract awarded by RFI for ‘services relating to the cleaning and maintenance of the decoration of the premises and other areas which are open to the public, as well as ancillary services in stations, plants, offices and workshops at various sites throughout the territory covered by the Direzione compartimentale movimento di Cagliari (Cagliari Regional Operations Division, Italy)’.

5 THE JUDGMENT AT FIRST INSTANCE

6 The judgment under appeal found, in particular, as follows:

– Article 115 of Legislative Decree No 163/2006 (and the similar, previously applicable provision, Article 6(4) of Law No 537/1993, as amended by Article 44 of Law No 724/1994) is not applicable in this case, ‘given that the activity which is the subject of the contract at issue must be regarded as falling within the “special sectors” referred to in Part III of the Codice degli Appalti (Procurement Code), **[Or. 3]** since both the subjective and the objective conditions are fulfilled for regarding the contract for services relating to the cleaning of railway stations as falling within the scope of Article 217 of the Procurement Code, which provides that the rules relating to special sectors do not apply to contracts awarded for purposes other than the pursuit of the activities referred to in Articles 208 to 213’;

– that is because ‘cleaning services fall under the rules relating to the special sectors when they are a functionally integral part of such an activity, which is so in the case of property and buildings that form an integral part of the production, distribution and transport network, referred to in Article 208 *et seq.* of Legislative Decree No 163 of 2006’; that is so in the case of the ‘service of cleaning stations, plants, offices and workshops … as operating plant and equipment and, as such, as elements forming an essential part of the railway transport network’;

– nor is price review mandatory under Article 1664 of the Codice Civile (Civil Code), since ‘the rule in question may in any case be derogated from at the will of the parties, which may insert into the contract a contractual term limiting price review, as occurred in the present case with the stipulation of the terms contained in Article 6 of the contract concluded by the parties on 23 February 2006’.

7 THE GROUNDS OF THE APPEAL

8 The grounds of appeal against that judgment are as follows:

(a) The judgment is flawed as a result of infringement and misapplication of Article 115 of Legislative Decree No 163/2006 and Article 6(4) of Law No 537/1993, as amended by Article 44 of Law No 724/1994; infringement and misapplication of Articles 206, 210 and 217 of Legislative Decree No 163/2006, inasmuch as ‘the contract at issue: (a) does not fall within the scope of Part III of the Procurement Code; (b) is instead subject to the rules laid down in Part II of the Procurement Code, and consequently Article 115 of Legislative Decree

No 163/2006 applies'. In order for a contract awarded for the provision of a service to be subject to the rules relating to special services, there must, in addition to a subjective criterion, also be an objective criterion, consisting in the instrumental nature of the service, that is to say, in the fact that it serves as a 'means to an end' in respect of the activity that unquestionably does fall within the special sectors. However, a cleaning service 'is by definition neutral, in the sense that it is always the same in nature, whether it is performed in municipal offices, in hospitals or at RFI's offices. In short, the contract at issue, awarded by a body governed by public law such, RFI, is governed by Part II of the Procurement Code and Article 115, a mandatory provision which replaces any stipulations to the contrary, consequently applies'.

(b) The judgment is flawed as a result of infringement and misapplication of Article 1664 of the Civil Code, in that 'the contract makes no express provision for any waiver of the upward adjustment of prices consequent upon additional costs arising from an increase in labour costs', the only terms present (which are, in any case contested, a declaration of their invalidity being sought in the event that 'they should be interpreted as precluding review') 'in so far as they make reference to the all-encompassing nature of the consideration, clearly refer to the conditions existing at the time the contract was concluded … but do not govern the situation resulting from supervening changes'. In any event, they must, pursuant to Article 1369 of the Civil Code, be given the interpretation best fitting the nature and subject matter of the contract and, in this case, the contract being one of periodic and continuous performance, 'price review in the event of an imbalance in the parties' obligations constitutes the rule'. In the alternative, the terms are to be regarded as null and void, pursuant to Article 1341(2) of the Civil Code, because they were not specifically approved in writing.

In the appellants' view, the national legislation, in so far as it results in the exclusion of the review of prices in the transport sector and, importantly, also in related cleaning contracts, infringes Directive 2004/17/EC. It 'is legislation that is excessive and unjustified having regard to Community law, unfairly disproportionate and such as to place the "auxiliary" undertaking (the entity awarded a contract for an activity such as cleaning) in a position of subordination and weakness in comparison with the undertaking that (actually) performs the public service', thus giving rise to 'an unfair and disproportionate contractual imbalance', as a result of the Italian legislation which 'ultimately distorts the rules governing the functioning of the market'.

The appellants therefore request that a reference be made to the Court of Justice in accordance with Article 267 TFEU in order 'to ascertain the compatibility with primary EU law and Directive 2004/17/EC of the interpretation of national law that excludes the review of prices in the case of contracts relating to the so-called 'special sectors', in particular, in the case of contracts the object of which is different from those to which that directive refers'.

In addition, a ruling is also requested on the validity of Directive 2004/17/EC itself (in the event that it is considered that the exclusion of the review of prices in all contracts concluded and implemented within the so-called 'special sectors' is a direct result of the directive) 'on the grounds of unfairness, disproportionality, distortion of the contractual balance and, therefore, of the rules governing an efficient market'.

The respondent RFI argues that the appeal is unfounded and, in particular, requests the dismissal of the questions concerning the compatibility with EU law of the national legislation which applies in this case.

9 THE PREVIOUS ORDER FOR REFERENCE

10 The Consiglio di Stato (Council of State, Italy) delivered Order No 1297 of 22 March 2017 referring to the Court of Justice of the European Union for a preliminary ruling, in accordance with Article 267 TFEU, the following questions concerning interpretation and validity:

1. Is an interpretation of national law that excludes price review in contracts relating to 'special sectors', particularly as regards contracts with a different object from those to which Directive 2004/17/EC refers, but which are functionally linked to those sectors, compatible with EU law, in particular, Article 3(3) TEU, Articles 26, 56 to 58 and 101 TFEU, and Article 16 of the Charter of Fundamental Rights of the European Union and Directive 2004/17/EC?

2. Is Directive 2004/17/EC (if it should be considered that price review may be excluded, in all contracts concluded and implemented within 'special sectors', as a direct result of that directive) compatible with the principles of the European Union, in particular Article 3(1) TEU, Articles 26, 56 to 58 and 101 TFEU, and Article 16 of the Charter of Fundamental Rights of the European Union, 'in the light of the unfairness, disproportionality and distortion of contractual balance and, therefore, of the rules governing an efficient market?'

11 WHETHER THE GROUNDS OF APPEAL LACK MERIT

12 The appeal, which disputes the inapplicability (found in the contested judgment) of the upward adjustment of the contract price for the cleaning service, which is performed in the transport sector, is essentially based on two distinct arguments:

– In the first place, the appellants argue that the cleaning service is 'by definition neutral in the sense that it is always the same in nature' wherever it is performed and, therefore, in the absence of any acknowledged functional link with the 'principal' service to which it relates (in this case the transport service), the rules relating to the 'special sector' (or 'excluded' sector, as per the previous definition) cannot apply, with the consequential inapplicability of Article 115 of Legislative Decree No 163/2006 (which provides generally that 'all contract that are performed periodically or continuously and which relate to services or supplies must contain a term on periodic review of the price').

– In the second place, Article 1664 of the Civil Code is applicable in any event, that provision providing for the possibility of requesting (and obtaining) a review of the 'total agreed price' (to be granted for 'a difference exceeding one tenth') in the event that, 'as a result of unforeseen circumstances, there have been increases or decreases in the cost of materials or labour such as to give rise to an increase or decrease greater than one tenth of the total agreed price'.

As regards the first of these two arguments, in Order No 1297 of 22 March 2017, the court did not consider that it needed to depart from what has previously been established in the case-law of the Consiglio di Stato (Council of State).

First of all, it must be recalled that, in Judgment No 16 of 1 August 2011, the Plenary Session began by emphasising that:

– 'Directive 2004/17/EC, implemented by Legislative Decree No 163/2006, like the directive on special sectors that preceded it (which was implemented in Italy by Legislative Decree No 158/1995), was enacted for the precise purpose of ensuring the protection of competition in procedures for the award of procurement contracts by entities operating in the sectors which, in the past, had been excluded from competition and Community laws on public procurement, that is to say, the so-called "excluded sectors", which, after Community intervention, became special (formerly excluded) sectors.'

– 'The intervention of the Community legislature, the aim of which was to bring sectors that had previously been regarded as being governed by private law within the scope of the rules on public procurement procedures, nevertheless continued to acknowledge the special characteristics of those sectors, by comparison with ordinary sectors, and laid down more flexible rules which allowed contracting authorities greater freedom, along with restrictive rules regarding the objective and subjective scope of their application.'

– 'Consequently, Community law rigorously defined not only the subjective scope of the special sectors (Article 207 of Legislative Decree No 163/2006, Articles 2 and 8 of Directive 2004/17/EC), but also their objective scope, defining in detail the confines of each special sector.' 'Community case-law confirms that the provisions of Directive 2004/17/EC must be applied restrictively. Consequently, the so-called 'infection theory', discussed in the judgment in *Mannesman* (judgment of 15 January 1998 in Case C-44/96), does not apply.'

Having made those preliminary observations, the Plenary Session found that:

'Whether the award of a contract for a service is governed by the rules laid down for the special sectors cannot be ascertained solely on the basis of a subjective criterion, that is to say, whether the contract is awarded by an entity operating in a special sector. An objective criterion must also be applied, namely whether the service relates to a special activity.' This follows from Article 217 of Legislative Decree No 163/2006 (which faithfully reproduces Article 20 of Directive 2004/17/EC), 'under which the rules governing special sectors do not apply to

contracts which contracting entities award for purposes other than the pursuit of their activities as described in Articles 208 to 213 or for the pursuit of such activities in a third country, in conditions not involving the physical use of a network or geographical area within the Community.'

More specifically, Order No 1297 of 22 March 2017 recorded that the Consiglio di Stato (Council of State) had found that:

'Given that the provision of building-cleaning services and property management services is included in the annexes to both the European directives (2004/17, which coordinates the procurement procedures of entities operating in the water, energy, transport and postal services sectors, and 2004/18, on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts), whether the award of a contract for a cleaning service is governed by the rules laid down for the special sectors cannot be ascertained solely on the basis of a subjective criterion, that is to say, whether the contract is awarded by an entity operating in a special sector. An objective criterion must also be applied, namely whether the cleaning service relates to a special activity.

In other words, cleaning services fall under the rules relating to the special sectors when they are a functionally integral part of that activity, which is so in the case of property and buildings that form an integral part of the production, distribution and transport network, referred to in Article 208 *et seq.* of Legislative Decree No 163 of 2006.'

With regard to the case then before the court, Order No 1297 of 22 March 2017 stated that:

– On the one hand, there is no doubt that the subjective criterion is fulfilled, as is demonstrated by the established fact that the authority awarding the contract, RFI, is included in the list of contracting entities set out in Article 210 of Legislative Decree No 163/2006 (and the appellants do not dispute that fact).

– On the other hand, the judgment under appeal states that 'the services relating to the cleaning of the stations, plants, offices and workshops at various sites throughout the territory covered by Cagliari Regional Operations Division, as "operating plant and equipment" and, as such, as elements forming an essential part of the railway transport network, must be regarded as falling under the rules on special sectors in that they are strictly integral, functionally, to that railway transport activity.'

In Order No 1297 of 22 March 2017, the court endorsed that conclusion, finding that it was not outweighed by the counter arguments put forward by the appellants to the effect that 'the mere service of cleaning premises open to the public and the stations and offices at various sites under the control of Cagliari Regional Operations Division' can 'in no way be regarded as having the same service objective as that pursued by RFI.'

Indeed, given the subject matter of the contract, 'it would appear evident that the cleaning service covered by it, far from being a service preceding, collateral to or additional to the transport service, specifically relates to the proper provision of that service, since it concerns property and buildings which constitute elements forming an essential part of the railway transport network.

The health and hygiene conditions of the various locales that are connected with the performance of the passenger and goods transport service are an essential pre-condition for the proper performance of that service. Consequently, the cleaning service, which is intended to ensure that the conditions for making the service workable are met, is connected with the transport service by an undeniable functional link.'

In conclusion, according to Order No 1297 of 22 March 2017, those considerations mean that the subjective and objective criteria that must be met in order for the contract for cleaning services under consideration to fall under the rules relating to the special sectors are fulfilled and Article 115 of the Procurement Code does not apply to the contract. Consequently, the price fixed in the contract cannot, in this particular case, be adjusted by means of any alleged 'periodic price review'.

In addition, in Order No 1297 of 22 March 2017, the court did not concur with the second of the arguments developed in the appeal, concerning the applicability to the case of Article 1664 of the Civil Code.

That was because, in the case of procurement contracts, the mechanism of 'periodic price revision' is governed by Article 115 of Legislative Decree No 163/2006 and – in so far as concerns the exclusion of its application to the special sectors – by Articles 206 and 217.

The Procurement Code thus contains special rules on the matter, which are mandatory and, as such, on the one hand (following the general principles of interpretation) they prevail over general rules; on the other, they render the provisions of the Civil Code inapplicable, as a result of an express legal provision, inasmuch as Article 2(4) of Legislative Decree No 163/2006, as is well known, renders 'provisions laid down in the Civil Code' applicable only 'as regards what is not expressly provided for'.

It is hardly necessary to add to the decisive conclusion set out above that:

– In the first place, the applicability of Article 1664 of the Civil Code also appears to be excluded in the present case by an express and permissible contractual agreement (Article 6) which, contrary to the appellants' submission, lays down specific rules, derogating from primary laws, in so far as concerns the timing and methods of review of the price agreed upon.

– In the second place, the review of 'the total price agreed upon' presupposes that any increases in the cost of materials or labour occur 'as a result of

unforeseen circumstances', that is, unforeseen at the time the contract was concluded. The effects of the normal renewal of employment contracts in the sector cannot be regarded as such.

13 THE APPLICATION FOR A REFERENCE TO BE MADE TO THE COURT OF JUSTICE OF THE EUROPEAN UNION FOR A PRELIMINARY RULING

14 Order No 1297 of 22 March 2017 noted that the appellants also raised the question of the legality under Community law of Articles 115, 206, 210 and 217 of Legislative Decree 163/2006, and of Article 6(4) of Law No 537/1993, on the ground that they infringed Article 3(3) TEU as well as Article 26 and Article 101 *et seq.* TFEU.

The appellants expressed their view that the national legislation, in so far as it results in the exclusion of the review of prices in the transport sector and, importantly, also in the case of related cleaning contracts, infringes Directive 2004/17/EC. It 'is legislation that is excessive and unjustified having regard to Community law, unfairly disproportionate and such as to place the "auxiliary" undertaking (the entity awarded a contract for an activity such as cleaning) in a position of subordination and weakness in comparison with the undertaking that (actually) performs the public service', thus giving rise to 'an unfair and disproportionate contractual imbalance', as a result of the Italian legislation which 'ultimately distorts the rules governing the functioning of the market.'

Because, as a result of the court's findings, the appeal could not succeed on the basis of Articles 115, 206 and 217 of Legislative Decree No 163/2006 and the interpretation of those provisions given by the national court, with which this Chamber concurs, in Order No 1297 of 22 March 2017, the court decided to refer to the Court of Justice of the European Union the questions for a preliminary ruling set out above.

15 THE JUDGMENT OF THE COURT OF JUSTICE

16 The Consiglio di Stato (Council of State) cites paragraphs 29, 30, 31, 36, 39 and 40 of the judgment of 19 April 2018 in Case C-152/17, as well as the operative part of that judgment, in which the Court of Justice held as follows:

'Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, as amended by Commission Regulation (EU) No 1251/2011 of 30 November 2011, and the general principles underlying that directive are to be interpreted as not precluding national rules, such as those at issue in the main proceedings, which do not provide for periodic price review after a contract has been awarded in the sectors covered by that directive.'

By a pleading dated 28 October 2018, the appellants requested the referring court to refer to the Court of Justice new questions for a preliminary ruling, some of which the court has taken up.

In substance, the appellants maintain that, in its judgment, the Court of Justice did not take a position on whether the cleaning service was functionally linked to the transport service, the latter being treated as special under European and national law. They point out that, in its judgment, the Court of Justice assumed that the duration of the contractual relationship was as stated in the initial invitation to tender, without any extensions, but that that does not accord with the factual situation in Italy, where service contracts are frequently extended by the public authorities, sometimes indefinitely, as they were when Legislative Decree No 163/2006 was still in force. That has upset the contractual balance in many service contracts. The price review mechanism is designed to restore fairness to the contractual relationship. The appellants cite, to that end, recitals 9, 10 and 45 of Directive 2004/17, as well as Article 57 thereof.

Succinct presentation of the reasons for the present request for a preliminary ruling

17 It is necessary to ascertain whether Articles 206 and 217 of Legislative Decree No 163/2006 are consistent with EU law in so far as they exclude the application of Article 115 of the Civil Code to contracts in the 'special sectors' and also exclude the application of that provision to service contracts which, while not falling within the special sectors (the contract in the present case being a contract for cleaning services), are functionally linked to them.

In addition, the appellants argue that the exclusion of price review 'is ultimately a measure … which prevents, restricts and distorts competition, to the extent of making the conclusion of the contract subject to acceptance by the contracting party of supplementary obligations which have no connection with the subject matter of the contract itself (Article 101(1)(e) TFEU), and which thus also negates the value of the market (Article 3(3) TEU)'.

The question which the appellants propose *ex novo* renders it necessary to refer to the Court of Justice an initial, preliminary question concerning:

– the issue of whether it is mandatory to request a preliminary ruling of the Court of Justice whenever, and at whatever stage of the proceedings, a party to the proceedings submits to a national court of last instance a question on the compatibility of national law with EU law, or

– whether it is mandatory to make a reference for a preliminary ruling, at the request of a party to the proceedings, only in respect of questions which the parties propose in their initial pleading, or up to the last pleading which they are permitted to lodge before the case is set down for judgment, and in no event once a reference has already been made to the Court of Justice for a preliminary ruling.

The referring court in fact considers that the requirement for a court of last instance to make a reference for a preliminary ruling cannot be separated from a system of 'procedural bars' that will lead the parties to legal proceedings to raise before the national court in a single instance all the aspects of national law applicable to the case before the court that they allege to be inconsistent with EU law.

If it were otherwise, the successive or continuous proposal of questions for a preliminary ruling — in addition to lending itself to possible misuse and, in extreme cases, a real 'abuse of procedure' — would ultimately (as a result of the requirement to make a reference) render the right to judicial protection nugatory and undermine the principle that legal proceedings must be concluded swiftly and effectively.

Furthermore, proposing questions for a preliminary ruling after the lodging of an appeal is inconsistent with the system of bars under Italian procedural law.