

Case C-299/19**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 April 2019

Referring court:

Tribunale ordinario di Torino (Turin District Court, Italy)

Date of the decision to refer:

9 March 2019

Applicant:

Techbau SpA

Defendant:

Azienda Sanitaria Locale AL

Subject matter of the main proceedings

Action brought by an undertaking against an *azienda sanitaria locale* (local health authority) (public authority) in order to obtain payment of default interest owing at the rate laid down in national legislation in relation to late payment in commercial transactions (decreto legislativo n. 231/2002 (Legislative Decree No 231/2002) or, in the alternative, the codice degli appalti (Public Procurement Code) applicable *ratione temporis*). The public authority concerned claims that the national legislation in question is not applicable in this case because the contract with the company in question is a public works contract.

Subject matter and legal basis of the reference

The reference for a preliminary ruling, under Article 267 TFEU, relates to the possible non-compliance of Legislative Decree No 231/2002, in particular Article 2(1)(a) of that decree, with Directive 2000/35/EC, in particular Article 2(1) thereof, in so far that decree excludes from its scope public works contracts within the meaning of Directive 93/37/EEC.

Question referred

Does Article 2(1) of Directive 2000/35/EC preclude a national provision, such as Article 2(1)(a) of Legislative Decree No 231 of 9 October 2002, which excludes works contracts, whether public or private, and specifically public works contracts within the meaning of Directive 93/37/EEC, from the concept of ‘commercial transaction’ — defined as contracts that ‘lead, exclusively or primarily, to the delivery of goods or the provision of services in exchange for remuneration’ — and therefore from the scope of that directive?

Provisions of EU law relied on

Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions, in particular Article 2.

Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts, in particular Article 1.

Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions, in particular recital 11.

Provisions of national law relied on

Decreto Legislativo 9 ottobre 2002, n. 231, Attuazione della direttiva 2000/35/CE relativa alla lotta contro i ritardi di pagamento nelle transazioni commerciali (Legislative Decree No 231 of 9 October 2002 implementing Directive 2000/35/EC on combating late payment in commercial transactions), in particular Articles 1 and 2.

Decreto legislativo 9 novembre 2012, n. 192, Modifiche al decreto legislativo 9 ottobre 2002, n. 231, per l'integrale recepimento della direttiva 2011/7/UE relativa alla lotta contro i ritardi di pagamento nelle transazioni commerciali, a norma dell'articolo 10, comma 1, della legge 11 novembre 2011, n. 180 (Legislative Decree No 192 of 9 November 2012 amending Legislative Decree No 231 of 9 October 2002 for the complete transposition of Directive 2011/7/EU on combating late payment in commercial transactions, in accordance with Article 10(1) of Law No 180 of 11 November 2011), in particular Article 1.

Decreto Legislativo 12 aprile 2006, 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 of 12 April 2006, Code on public works contracts, public service contracts and public supply contracts implementing Directives 2004/17/EC and 2004/18/EC).

Legge 30 ottobre 2014, n. 161, Disposizioni per l'adempimento degli obblighi derivanti dall'appartenenza dell'Italia all'Unione europea — Legge europea 2013-bis (Law No 161 of 30 October 2014 laying down provisions for the fulfilment of the obligations arising from Italy's membership of the European Union — European Law 2013-bis), in particular Article 24.

Succinct presentation of the facts and the main proceedings

- 1 A procurement contract was concluded between the Azienda Sanitaria Locale di Alessandria (Alessandria Local Health Authority ('the ASL') and Techbau SpA ('Techbau') on 29 April 2010 for a total amount of EUR 7 487 719.49. The contract covered the 'turnkey' supply and installation of a surgical block in the form of a prefabricated modular system for the Ospedale Santo Spirito in Casale Monferrato. In accordance with the special tender specifications, the service to be provided by the undertaking consisted of the following: the supply of a surgical block made up of six operating theatres, the construction of the supporting structure, plans drafted on the basis of the technical requirements set out in the specifications, and the performance of all civil engineering and installation work necessary or instrumental in that supply.
- 2 The ASL paid the contractual amount, but considerably later than the deadlines laid down in the tender specifications. Techbau has calculated the default interest it believes to be payable as EUR 197 008.65 and initiated legal proceedings to obtain payment of that amount.
- 3 Techbau contends that the ASL should be ordered to pay the default interest at the rate laid down in Legislative Decree No 231/2002, calculated in the above amount or, in the alternative, calculated according to the Public Procurement Code applicable *ratione temporis* (namely Legislative Decree No 163/2006) in an amount of EUR 93 452.31.

The essential arguments of the parties to the main proceedings

- 4 The ASL claims that the contract with Techbau is a public works contract, and therefore does not fall within the scope of Legislative Decree No 231/2002.
- 5 For its part, Techbau maintains that, in accordance with a 'predominance test' (the consideration agreed is attributable 73% as to supplies and 27% as to services), the public contract should be classified as a whole as a supply and services contract, so that Legislative Decree No 231/2002 is clearly applicable.

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

- 6 The referring court notes that the ASL has not specifically contested the payment delays alleged by Techbau.

- 7 As regards the nature of the contract between the parties, the referring court is of the view that it is a works contract and, in that regard, refers to the settled national administrative case-law, to the effect that a tender or works contract is deemed to exist if the actual principal purpose of the contract is the execution of a single work and the supply of the material is but one element in the execution of the work.
- 8 In addition, the referring court observes that, on the basis of an examination of the special tender specifications attached to the contract, the ASL requested substantial and specific modifications to the work, which is a clear sign that it is a contract for manufacture (works contract).
- 9 Legislative Decree No 231/2002 therefore applies to the contract being discussed in this case.
- 10 Legislative Decree No 231/2002, in the version applicable at the material time, transposes Directive 2000/35/EC into Italian law.
- 11 The point of contention relates to the definition of the scope of the abovementioned decree, in particular as regards the purpose of the contract.
- 12 The scope of Legislative Decree No 231/2002 covers ‘all payments made by way of remuneration in a commercial transaction’ (Article 1(1)), where ‘commercial transactions’ are defined as ‘contracts, howsoever named, between undertakings or between undertakings and public authorities which lead, exclusively or predominantly, to the delivery of goods or the provision of services for remuneration’ (Article 2(1)(a)).
- 13 The referring court mentions the position adopted by various national bodies (Autorità Garante per i Lavori Pubblici (Public Works Regulator), Autorità Nazionale Anti Corruzione (National Anti-Corruption Authority), case-law) to the effect that Legislative Decree No 231/2002 is not applicable to works contracts (whether public or private), but indicates that it does not agree with that position.
- 14 According to the court, that view is not satisfactory, because it claims to establish the meaning of ‘the delivery of goods or the provision of services’, for the purpose of defining the scope of Legislative Decree No 231/2002, solely on the basis of a provision of national law, without taking into consideration the fact that, because it serves to transpose Directive 2000/35/EC into Italian law, Legislative Decree No 231/2002 should be interpreted according to the meaning attributed to the expression ‘the delivery of goods or the provision of services’ in EU law.
- 15 For that purpose, the referring court examines Directive 2000/35/EC and states that the concept of ‘provision of services’ should be interpreted independently, as defined within the directive, and in line with EU law, to establish whether a works contracts falls within the scope of the directive.

- 16 The referring court notes that Article 2(1) of the abovementioned directive defines the term ‘public authority’ by reference to other directives, in particular Directive 93/37/EEC, which specifically relates to public works contracts.
- 17 In the view of the referring court, it is clear that there would be no reason to adopt the concept of contracting authority as defined in Directive 93/37/EEC if contracts for manufacture (works contracts) were not included within the concept of commercial transaction, based on ‘the delivery of goods or the provision of services’, and therefore also fell outside the provisions governing late payments.
- 18 The referring court also makes reference to Directive 77/388/EEC, Article 2 of which makes ‘the supply of goods or the provision of services’ subject to VAT, and Directive 2006/112/EC, indicating that no one has ever questioned the fact that works contracts fall within the scope of VAT, as they clearly involve the provision of services.
- 19 According to the referring court, those arguments lead to the conclusion that it is reasonably plausible to interpret Article 2(1) of Directive 2000/35/EC as meaning that the concept of ‘the delivery of goods or the provision of services’ also includes works contracts, whether private or public, and specifically public works contracts within the meaning of Directive 93/37/EEC.
- 20 The referring court also examines Directive 2011/7/EU, in particular recital 11, and infers from that directive that it confirmed the scope of the provisions governing late payments is as expressly including matters which, although they fall within the concept of ‘supply of goods and provision of services’, the Member States may have excluded from national provisions.
- 21 In the present case, given that the Italian legislation transposing Directive 2000/35/EC (namely Legislative Decree No 192/2012) does not clearly include public works contracts within the scope of the rules governing late payments, that legislation does not comply with EU law.
- 22 After infringement proceedings (EU PILOT/5216/13/ENTR) were brought against Italy, the Italian State complied by introducing Law No 161 of 30 October 2014 (in particular Article 24), which provided an authentic interpretation of Article 2(1)(a) of Legislative Decree No 231/2002, and it can no longer therefore be in dispute that contracts for manufacture or works contracts fall within the scope of EU rules on late payments.
- 23 The referring court observes, however, that since Law No 161/2014 interprets Article 2(1)(a) of Legislative Decree No 231/2002 as having been replaced by Article 1(1)(b) of Legislative Decree No 192/2012, and since that law does not contain precise, express transitional rules extending the scope of the law to cover contracts existing prior to the entry into force of the most recent law that has been subject to interpretation, it is not clear whether Article 2(1)(a) of Legislative Decree No 231/2002 is applicable to public works procurement contracts

concluded before 1 January 2013 (or only to contracts concluded after Legislative Decree No 192/2012 entered into force, and thus after 1 January 2013).

- 24 In the light of the above, and for the purpose of ensuring that Article 2(1)(a) of Legislative Decree No 231/2002 is applied in compliance with EU law, the referring court considers it essential to establish whether the concept of commercial transaction in Directive 2000/35/EC includes works contracts, both public and private, and specifically public works procurement contracts, as referred to in Directive 93/37/EEC.

WORKING DOCUMENT