Case C-6/20

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:

7 January 2020

Referring court:

Tallinna Ringkonnakohus (Estonia)

Date of the decision to refer:

19 December 2019

Appellant:

Sotsiaalministeerium

Respondent:

Innove SA

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Subject matter of the main proceedings

Appeal brought by the Sotsiaalministeerium (Ministry of Social Affairs, Estonia) against the judgment of the Tallinna Halduskohus (Administrative Court, Tallinn, Estonia) of 22 May 2019 dismissing the action brought by the Ministry of Social Affairs seeking the annulment of the financial correction decision of SA Innove ('Innove'), by which the applications for payment submitted by the Ministry of Social Affairs under a food aid project were refused owing to an alleged infringement of public procurement rules

Subject matter and legal basis of the request

Request for an interpretation of Articles 2 and 46 of Directive 2004/18 pursuant to the third paragraph of Article 267 TFEU

Questions referred

1. Are Articles 2 and 46 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 to be interpreted as precluding national legislation — such as Paragraph 41(3) of the Riigihangete seadus (Estonian Law on public procurement; 'the RHS') — pursuant to which, if specific requirements for the activities to be carried out under a public contract are laid down by law, the contracting authority must specify in the tender notice which registrations or activity licences are required to qualify the tenderer, must require the tenderer to submit evidence of the activity licence or registration for the purpose of verifying compliance with the special statutory requirements in the tender notice, and must refuse the tenderer as unqualified if the latter does not possess the relevant activity licence or registration?

2. Read together, are Articles 2 and 46 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 to be interpreted as precluding the contracting authority, in the case of a food aid procurement contract that exceeds the international threshold, from setting a selection criterion for the tenderers according to which all tenderers, irrespective of where they were previously established, must already hold an activity licence or be registered in the country of the food aid operations at the time of submission of the tenders, even if the tenderer has not previously been established in that Member State?

3. If the preceding questions are answered in the affirmative:

3.1. Are Articles 2 and 46 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 to be regarded as provisions that are so unambiguous that the principle of the protection of legitimate expectations cannot be invoked against them?

3.2. Are Articles 2 and 46 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 to be interpreted as meaning that a situation in which the contracting authority in a public tender for food aid requires, pursuant to the national law on foodstuffs, that the tenderers already hold an activity licence at the time of submission of the tender may be regarded as constituting a manifest infringement of the rules in force, as negligence or as an irregularity precluding reliance on the principle of the protection of legitimate expectations?

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Provisions of EU law cited

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), Articles 2 and 46

Regulation (EC) No 852/2004 of the European Parliament and of the Council of 29 April 2004 on the hygiene of foodstuffs (OJ 2004 L 139, p. 1), Article 6(3)(a), (b) and (c)

Regulation (EC) No 853/2004 of the European Parliament and of the Council of 29 April 2004 laying down specific hygiene rules for food of animal origin (OJ 2004 L 139, p. 55)

Commission Decision C(2013)9527 final of 19 December 2013 on the setting out and approval of the guidelines for determining financial corrections to be made by the Commission to expenditure financed by the Union under shared management for non-compliance with the rules on public procurement

National legislation cited

Riigihangete seadus (Law on public procurement; 'the RHS') in the version in force until 31 August 2017 (consolidated text RT I, 25.10.2016, 20), Paragraphs 3, 15(2), 39(1) and 41(3)

Toiduseadus (Law on foodstuffs; 'the ToiduS') (RT I 1999, 30, 415 with subsequent amendments), Paragraphs 7, 8 and 10

Perioodi 2014-2020 struktuuritoetuse seadus (Law on structural aid for the period 2014-2020; 'the STS'), Paragraphs 3 and 4

Brief summary of the facts and procedure

1 In 2015 and 2017, the Ministry of Social Affairs launched open invitations for tenders No 157505 and No 189564 'Food aid for the most disadvantaged', which were above the international threshold (estimated value of EUR 4 million each). The tender notice for public contract No 157505 stipulated that the tenderer had to have the approval required by the Veterinaar- ja Toiduamet (Veterinary and Food Administration, Estonia; 'the VTA') for the performance of the contract and had to provide confirmation thereof and the approval number. The tender documents for public contract No 157505 were amended during the tendering procedure. Following this amendment, the tenderer was no longer obliged to submit confirmation of the VTA's approval together with the approval number, but rather confirmation of compliance with the registration and licence obligation was sufficient. The same requirement was imposed for public contract No 189564. For

both public contracts, framework agreements were entered into with three successful tenderers.

2 Innove's financial correction decision of 30 October 2018 refused to accept payment applications which the Ministry of Social Affairs had submitted under the 'Conditions for purchasing and distributing food aid to the most disadvantaged' in support of the 'Supply of food and transport to the place of storage' project for EUR 463 291.55, because the Ministry of Social Affairs had failed to fulfil its obligation under the Perioodi 2014-2020 struktuuritoetuse seadus (Law on structural aid for the period 2014-2020, 'STS') to comply with the Riigihangete seadus (Law on public procurement, 'the RHS'), which was in force until 31 August 2017.

3 Innove took the view that both public contracts had set selection criteria which unduly restricted the circle of tenderers, in particular foreign tenderers. The unreasonable restriction resided, in its view, in the fact that the tenderers were required to have authorisation from the Estonian authority or to comply with the registration and licence obligation in Estonia. Even if the tenderer could have satisfied the condition imposed by relying on the resources of another person or by submitting a joint tender with a person who satisfied the conditions, that did not mean that the condition imposed became lawful, that is to say, that it did not unduly restrict the circle of tenderers. Tenderers who were not able to rely on the resources of another person or to submit a joint tender may have withdrawn from the tender because they were unable to comply with the deadline set for the submission of tenders. The Ministry of Social Affairs had infringed Paragraphs 3 and 39(1) of the RHS. The decision was based on an examination by the Rahandusministeerium (Ministry of Finance, Estonia), in the context of which the public tenders at issue were examined. The final examination report indicated that the selection criteria set in the tender notice for public contracts No 157505 and No 189564 were unduly restrictive as regards foreign tenderers.

4 Innove dismissed the objection of the Ministry of Social Affairs by objection decision of 25 January 2019 and took the view that the requirement imposing a registration and activity licence obligation, as stipulated in the tender notices, discriminated against tenderers on the basis of their origin and constituted a disproportionate restriction which allowed for unequal treatment of tenderers.

5 The Ministry of Social Affairs brought an action before the Tallinna Halduskohus (Administrative Court, Tallinn) seeking the annulment of the financial correction decision issued by Innove on 30 October 2018. The applicant submitted that the tenders had been carried out in the proper manner and that it had no discretion in the decision as to the stage of the procedure at which the activity licence requirement should be imposed. For public contracts No 157505 and No 189564, the specific requirements for the activities to be carried out laid down by law for public procurement were the requirements imposing the registration and licence obligation that were provided for in Paragraphs 7 and 8 of the Toiduseadus (Law on foodstuffs; 'the ToiduS') and in Article 6(3) of Regulation (EC) No 852/2004

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of the European Parliament and of the Council. The contested decision wrongly took the view that, since a public contract for foodstuffs (supplies) was involved, the contracting authority could not require an activity licence pursuant to Article 46 of Directive 2004/18. In the case of the physical handling of foodstuffs in Estonia, the contractor or the warehouse used by him under contracts or subcontracts must hold a VTA activity licence, and foodstuff-handling licences were not mutually recognised by the Member States. It was not possible for the contracting authority to qualify a tenderer on the basis of an activity licence from the country in which he was established. In view of the deadline for submitting tenders for the international tender (at least 40 days) and the licensing procedure deadline provided for in the ToiduS (30 days), the tenderer also had sufficient time for the licensing procedure. The defendant takes the view that damage had not been demonstrated. Furthermore, the public contract No 157505 had previously been audited twice by Ministry of Finance examiners and that examination had found that the conditions (including those relating to the activity licence) were consistent with the RHS. A retroactive change in interpretation was not consistent with the principle of sound administration.

6 Innove requested that the action be dismissed. It confirmed that, although it appeared that, on the basis of a literal interpretation of Paragraph 41(3) of the RHS, the contracting authority could require the tenderer to submit the activity licence or registration or other appropriate certificate required under Estonian law to demonstrate compliance with the specific requirements, that requirement must be interpreted in the light of the relevant legal acts of the European Union (in particular, Directive 2004/18) and in conjunction with the case-law. In addition, the condition according to which the contracting authority required tenderers to comply with the specific requirements of Estonian law at the time of submission of the tender was not consistent with the principle of equal treatment laid down in Paragraph 3(3) of the RHS. Innove also took the view that, according to the case-law of the Court of Justice, the principle of equal treatment of tenderers precluded the introduction of conditions for participation in a tendering procedure which required knowledge of the practice of the country in which the contracting authority was established (judgments of 14 December 2016, *Connexxion Taxi Services*, C-171/15, EU:C:2016:948, paragraph 42, and of 2 June 2016, *Pizzo*, C-27/15, EU:C:2016:404, paragraphs 45, 46 and 51).

7 Innove took the view that, in the context of the tendering procedures, there should have been an assessment as to whether the tenderers who had previously provided a service in another Member State and the tenderers who had previously handled foodstuffs in Estonia were in the same situation as regards the imposition of the condition at issue and thus fulfilled the requirements of Estonian law. Innove emphasised that the principle of the protection of legitimate expectations had not been infringed. The beneficiary's legitimate expectation that the support would be maintained must be balanced against the right of third parties to take part in a competition procedure and in a procurement procedure without unlawful restrictive conditions, and against the public interest, including the European interest in ensuring the smooth functioning of the internal market through

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competitive procurement procedures and transparent use of EU resources. In the present case, the rights of third parties and the interests of the Community as a whole must be regarded as overriding public interests which outweighed any legitimate expectation on the part of the recipient of the support that the contested decision would not be adopted.

8 The Ministry of Finance requested that the action be dismissed. It argued that the applicant did not have standing to bring proceedings and that the Administrative Court did not have jurisdiction to rule on that action, since national law provided for a different procedure for resolving such a dispute. The Ministry of Finance takes the view that the selection criteria in the tender notice were unduly restrictive. It argued that foreign suppliers not established in Estonia had to comply with the requirements of the country in which they operated and were subject to the supervision of the competent authority of the country in which they were established. Estonia was not able to assess the activity licences of foreign tenderers for the handling of foodstuffs, as it was not possible for Estonia to control the activities of the foreign company. The requirement imposing a registration and licence obligation is a requirement of EU law which applies throughout the Union. In order for the restriction provided for to be proportionate in relation to foreign tenderers and at the same time to provide the contracting authority with the assurance that it was not dealing with an illegal operator, the contracting authority should have allowed, for the purposes of qualification, the submission of an equivalent licence or certificate issued by the country of establishment of the foreign tenderer or another competent authority and should have been permitted to require a foreign tenderer to comply with the requirements — arising under Estonian law and necessary for the performance of the contract — only during performance of the public contract. The Ministry of Finance took the view that the principle of the protection of legitimate expectations did not extend to the executive. The judgments of the Court of Justice have, it was argued, also concluded that a recipient of support could not rely on a legitimate expectation if he had failed to fulfil his obligation in a significant manner.

9 The Tallinn Administrative Court dismissed the action by judgment of 22 May 2019. According to the tender notice, the tenderer required VTA approval to perform the contract, for which he had to provide confirmation and an approval number. The court concluded that this requirement resulted in unequal treatment of foreign tenderers, since a foreign tenderer who had not previously operated in Estonia could not have complied with the required registration and licence obligation at the time when the tender was submitted. Estonian tenderers who had previously gained experience of carrying out an activity in Estonia were in a better position when compared with other economic operators having similar experience in other EU countries.

10 The Administrative Court referred to the document issued by the European Commission 'Guidance for practitioners on avoiding the most common errors in projects funded by the European Structural and Investment Funds', which, under

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the heading 'Common mistakes leading to financial corrections at the invitation to submit a tender stage', cites as an example of a discriminatory requirement the obligation to already have the qualification/professional certificate recognised by a body in the country of the contracting authority at the time of submission of offers, which is discriminatory as it would be difficult for foreign tenderers to comply with this at the time of submission of offers.

11 The licence and registration obligation imposed in the tender notice was not a specific requirement within the meaning of Directive 20[0]4/18. Article 46 of Directive 2004/18 referred to (specific) selection criteria for tenderers and not to requirements stipulated in relation to activity licences. A specific requirement within the meaning of Directive 20[0]4/18 could be that the handling of foodstuffs was subject, for example, to enrolment in the relevant register of food business operators or to a specific professional certificate which was a prerequisite for applying for an activity licence. The meaning of Article 46 of the Directive was better conveyed by the English version of the directive, which used the expression 'particular authorisation'. This wording referred specifically to the specific requirements imposed on tenderers. Directive 2004/18 did not refer to the (usual) authorised activities such as the handling of foodstuffs. Moreover, the latter was subject to harmonised requirements within the European Union, with the result that there could not be a 'specific requirement' in that regard.

12 Paragraph 41(3) of the RHS must be interpreted in accordance with EU law. The court takes the view that the contracting authority should not have accepted a corresponding licence from the country of origin of the tenderer from another Member State, but should have made it possible to obtain such a licence in Estonia. The defendant's references to the judgments of the Court of Justice of 27 October 2005, *Contse and Others* (C-234/03, EU:C:2005:644), of 26 September 2000, *Commission v France* (C-225/98, EU:C:2000:494) and of 7 July 2016, *Ambisig* (C-46/15, EU:C:2016:530) were not relevant, since the restrictions in the present case arose from a national legal act (the ToiduS) referred to in the tender documents.

13 The Tallinn Administrative Court also took the view that the principle of the protection of legitimate expectations was a principle of EU law on which the applicant could rely. Previous examinations could not provide the legal certainty that no irregularities would subsequently be established. The examinations conducted by the Ministry of Finance were not legally binding. Following the Court of Justice's case-law, the principle of the protection of legitimate expectations could not be relied upon against an unambiguous provision of EU law; nor could the conduct of a national authority responsible for applying EU law, which acted in breach of that law, give rise to a legitimate expectation on the part of an economic operator of beneficial treatment contrary to EU law (judgment of 5 March 2019, *Eesti Pagar*, C-349/17, EU:C:2019:172, paragraph 104 and the case-law cited). The financial correction measure was not punitive in nature. The state did not have a subjective right to structural support. The prohibition of retroactive effect was therefore not applicable.

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Main arguments of the parties in the appeal proceedings

14 The Ministry of Social Affairs lodged an appeal with the Tallinna Ringkonnakohus (District Court, Tallinn, Estonia), requesting that the judgment of the Tallinna Halduskohus (Administrative Court, Tallinn) of 22 May 2019 be set aside and that a new judgment upholding the action be issued.

15 The Ministry of Social Affairs takes the view that the Administrative Court erred in finding that, instead of a selection criterion, requirements should have been provided for during the performance stage of the public contract. Pursuant to Paragraph 39(1) and Paragraph 41(3) of the RHS, the contracting authority, when acquiring a service for which an activity licence was required, must set that requirement of an activity licence as a selection criterion. The existence of such an obligation on the part of the contracting authority had also been confirmed by administrative practice (see judgment of the Tallinna Halduskohus [Administrative Court, Tallinn] of 21 February 2013 in Case No 3-12-2349).

16 There was, it was argued, no conflict between Article 46 of Directive 2004/18/EC and Paragraph 41(3) of the RHS. The directive did not specify at what point in time the tenderer was required to hold an activity licence. The Administrative Court wrongly held that, in the case of statutory activity licences, Paragraph 41(3) of the RHS conferred on the contracting authority the right to interpret that requirement in such a way that it was always permissible for the tenderer to meet the requirement by producing an activity licence from the country in which he was established. Regulation of the food sector consisted of special legal provisions on public contracts, the specifics of which had not yet, however, been clarified by the Administrative Court.

17 The Ministry of Social Affairs also takes the view that references to the judgments of the Court of Justice in the *Contse and Others* (C-234/03), *Commission v France* (C-225/98) and *Ambisig* (C-46/15) cases were not relevant. The requirements at issue in those cases (existence of an office in the country in which the service was provided, requirement of membership of the association of designers in the Member State of the contracting authority, and requirement of certification of the purchaser's signature) differed significantly from that at issue in the present case. The purpose of the requirement of an activity licence was to ensure that health protection requirements were complied with and that safe food was distributed to the beneficiaries of the aid. The *Eesti Pagar* judgment (C-349/17) cited by the Administrative Court was not relevant either, since it concerned the recovery of State aid for which EU law was directly applicable. Similarly, it was unlikely that a potential tenderer would refrain from submitting a tender due to the activity licence requirement. Foreign tenderers could have made use of the resources of another person and submitted a joint bid if they were unwilling or unable to meet the activity licence requirement.

18 Finally, the Ministry of Social Affairs submits that the defendant's conduct infringed the principles of the protection of legitimate expectations and sound

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administration. Although the principle of the protection of legitimate expectations did not apply in the event of a manifest infringement of the rules in force, negligence or irregularity (see judgment of the Court of Justice of 13 March 2008, *Vereniging Nationaal Overlegorgaan Sociale Werkvoorziening and Others*, C-383/06 to C-385/06, EU:C:2008:165, paragraphs 52 and 56), there was no such infringement, negligence or irregularity in the present case.

19 Innove requests that the appeal be dismissed, maintains its previous position and agrees with the grounds of the judgment of the Administrative Court.

20 The Ministry of Finance requests that the appeal be dismissed and also reiterates its previous position.

Brief summary of the basis for the request

21 The main issue in the dispute is whether, in the context of food aid procurement, it is permissible to stipulate, as a condition of tender for a public contract above the international threshold, the requirement that the tenderer must have approval issued by the Estonian authorities under the Law on foodstuffs or must have satisfied the registration and licence requirement in Estonia at the time of submission of the tender, and whether, if such a requirement unduly restricts foreign tenderers, a financial correction decision may be taken due to a change in the interpretation of the law and the directive in a situation where the contract has previously been examined by the competent authority at national level.

22 The second paragraph of Article 46 of Directive 2004/18 provides for the possibility of requiring tenderers to provide proof of their suitability to pursue a professional activity by means of an authorisation issued by the competent authority of the Member State of establishment. In the present case, however, the contracting authority (the applicant) required of tenderers, pursuant to Paragraph 41(3) of the RHS, an activity licence or the fulfilment of a registration obligation provided for in the Law on foodstuffs. The performance of the public contract is subject to compliance with this licence or registration obligation, and this is not in dispute between the parties. In order to ensure food safety, the requirement for such a licence is permissible pursuant to Regulation (EC) No 852/2004 on the hygiene of foodstuffs. However, the conditions for the licence (approval) by the competent authority are not fully harmonised (see Article 6(3) of the Directive) and, in order to operate in another Member State, an economic operator must obtain the required approval from the country where he operates, that is to say, he cannot rely on approval in his country of origin.

23 If the tenderer is qualified solely on the basis of an undertaking to apply for an activity licence or registration required under the Law on foodstuffs, the possibility of performing the public contract may be called into question if the tenderer fails to comply with that obligation or fails to meet the licence or registration requirements. In this case, the objectives of the public contract will

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not be achieved and the contracting authority will have to carry out a new procurement procedure.

24 The Administrative Court correctly explained that, since tenderers were expected to have previous experience, an assessment of the effect of the condition on tenderers just starting out in the food sector was irrelevant, with the result that it could also not be claimed that foreign tenderers were in the same situation as Estonian tenderers just starting out in the food sector. Estonian tenderers who had previously gained experience of carrying out an activity in Estonia were in a better position compared with other economic operators with similar experience in other countries of the European Union.

25 It is therefore important to assess whether ensuring food safety and the attainment of the objectives of the public contract justify the imposition of a restriction on tenderers which de facto places foreign tenderers in a more difficult situation in which, before submitting a tender, they must either apply for the required licence or registration or submit a joint tender with an already approved or registered company, that is to say, a company operating in Estonia. The District Court takes the view that it is disproportionate to require tenderers to do this in the case of an international tender that exceeds the threshold.

26 Article 46 of Directive 2004/18 cannot be regarded as sufficiently clear. This issue has not yet been addressed in the Court of Justice's case-law to date. According to the case-law of the Court of Justice, the principle of equal treatment of tenderers precludes the introduction of conditions for participation in a tender procedure which require knowledge of the practice of the country in which the contracting authority is established (*Connexxion Taxi Services* judgment, C-171/15, paragraph 42, and *Pizzo* judgment, C-27/15, paragraphs 45, 46 and 51). The Estonian laws are clear in comparison with the cases referred to above. The criteria for applying for a licence or registration are clear from the Law on foodstuffs, and the VTA has also explained how to apply for a licence on its website (https://vet.agri.ee); none of the tenderers has claimed that it did not understand these conditions or asked for clarification of the conditions. The selection criterion at issue is also clear and does not pose a risk of ambiguity.

27 Cases C-225/98 and C-234/03 did not assess the permissibility of conditions imposed in the public interest of the European Union as a whole. The requirement of opening an office in the tenderer's Member State or membership of an association of persons pursuing the same profession in the tenderer's Member State does not serve public interests which protect the public and consumers in the same way in all Member States. The District Court takes the view that, unlike the circumstances in the aforementioned cases, in the present case the food safety requirements are justified as a condition for performance of the contract and the dispute can concern only the question of when the tenderer was required to fulfil the condition — when the tender was submitted or when the contract was being performed. Therefore, in the present case, a certain degree of inequality between

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tenderers may also be justified by the need to ensure the effectiveness of the procurement procedure (subsequent performance of the public contract).

28 It is therefore unclear to the District Court whether, read in conjunction with one another, Articles 2 and 46 of Directive 2004/18 are to be interpreted as precluding the contracting authority, in the case of a food aid procurement contract that exceeds the international threshold, from setting a selection criterion for the tenderers according to which all tenderers, irrespective of where they were previously established, must hold an activity licence or be registered in the country of the food aid operations at the time of submission of the tenders. In order to obtain a formalistic interpretation, account must also be taken of the specificities of the food-handling sector, where the provision of the service requires food handling in the country of the contracting authority and, in order to handle food, the activity licence required under points (2) to (9) of Paragraph 8(1) of the Law on Foodstuffs must exist, taking account of the discretion conferred on the Member States partly by Article 6(3)(b) and (c) and partly by Article 6(3)(a) of Regulation No 852/2004.

29 If the previous question is answered to the effect that national legislation such as Paragraph 41(3) of the RHS is contrary to the abovementioned provisions of Directive 2004/18, it is also necessary to assess whether Articles 2 and 46 of Directive 2004/18 can be regarded as sufficiently unambiguous that the principle of the protection of legitimate expectations cannot be relied on against them (see *Eesti Pagar* judgment, C-349/17, paragraph 104) and whether those provisions are to be interpreted as meaning that the conduct of the contracting authority, such as that in the present case, in which all tenderers were required to hold an activity licence pursuant to the Law on foodstuffs at the time of submission of the tender, may be regarded as a manifest infringement of the rules in force, as negligence or as an irregularity precluding reliance on the principle of the protection of legitimate expectations (see *Vereniging Nationaal Overlegorgaan Sociale Werkvoorziening and Others*, judgment, C-383/06 to C-385/06, paragraphs 52 and 56).

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