

Anonymised version

Translation

C-313/24 – 1

Case C-313/24

Request for a preliminary ruling

Date lodged:

29 April 2024

Referring court:

Consiglio di Stato (Italy)

Date of the decision to refer:

26 April 2024

Applicant:

Opera Laboratori Fiorentini SpA

Defendants:

Ministero della Cultura

Gallerie degli Uffizi

A.L.E.S. – Arte Lavoro e Servizi SpA

[...]

ITALIAN REPUBLIC

Consiglio di Stato (Council of State)

in sede giurisdizionale (Sezione Quinta) (sitting as a Court (Fifth Chamber))

gives the following

ORDER

in the action [...] brought by

EN

Opera Laboratori Fiorentini S.p.A., [...]

v

Ministero della Cultura and Gallerie degli Uffizi, [...];

A.L.E.S. – Arte Lavoro e Servizi S.p.A., [...];

intervening parties:

Scudieri International S.r.l., [...];

seeking variation of judgment No 00508/2023 of the Tribunale Amministrativo Regionale per la Toscana (Regional Administrative Court, Tuscany, Italy) (First Chamber), delivered in proceedings between the parties.

[...] [*procedure*]

I. Summary of the subject matter of the dispute and relevant findings of fact

I.1. The subject matter of the present proceedings is the award of the 10-year concession for the cafeteria and catering service at the Pitti Palace and Boboli Gardens, which form part of the Uffizi Gallery museum complex in Florence, for the amount of EUR 8 892 215 plus VAT.

I.2. Following the open electronic tendering procedure held by the contracting authority, the Ministero della Cultura (Italian Ministry of Culture) in partnership with the Uffizi Gallery, Scudieri International Srl was awarded the overall score of 74.97 points, consisting of 69.91 points for the technical tender and 5.062 points for the financial tender.

The other tenderers received lower scores, namely 65.139 points for Momento Srl, 66.889 points for Vivenda SpA and 73.78 points for Opera Laboratori Fiorentini SpA, which was thus ranked second.

I.3. Opera Laboratori Fiorentini appealed to the Tuscany Regional Administrative Court against the award decision of 25 November 2022 and other decisions in the course of the tendering procedure by an action containing five pleas in law, the second of which alleged infringement of Article 80 of Legislative Decree No 50/2016 and of Legislative Decree No 231/2001, and of Article 5k of Regulation (EU) 2022/576 of 8 April 2022 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine.

The Ministry of Culture gave notice of its intention to defend the action [...] [*procedure*], seeking dismissal of the action.

A.L.E.S. – Arte Lavoro e Servizi S.p.A. gave notice of its intention to defend the action, pleading its lack of standing and stating that it had no involvement in the

tender at issue, since the procedure had been organised and managed by the Ministry of Culture. In the alternative, it requested that the action be dismissed.

[...] [*procedure*] Scudieri International has produced documents relating to the nationality of Mr MT [...].

[...] [*procedure*]

I.4. By judgment No 508 published on 25 May 2023, the Regional Administrative Court dismissed the appeal of Opera Laboratori Fiorentini, including the plea alleging infringement of Article 5k of Regulation (EU) 2022/576, amending Regulation (EU) 833/2014, in so far as it prohibits the award and continued execution of public contracts and concessions with ‘a natural or legal person, entity or body acting on behalf or at the direction of an entity referred to in point (a) or (b) of this paragraph, including, where they account for more than 10% of the contract value, subcontractors, suppliers or entities whose capacities are being relied on within the meaning of the public procurement Directives’.

The applicant had submitted that that provision was applicable to Scudieri International on account of the fact that two of the three members of its board of directors were Russian nationals; one of them, Mr MT, was also chairman of the board of directors and chief executive officer of the company, as well as sole director of Sielna SpA, a company that held 90% of the share capital of Scudieri International.

According to the applicant, the prohibition was in effect at the time of participation in the tender, and as such was a prerequisite for participation which should have been verified at the time of admission to the procedure.

The court did not share the applicant’s interpretation, finding that it would have the effect of an extensive application of a ban ‘aimed at preventing the award of contracts to companies with registered office in Russia’, whereas the successful tenderer Scudieri International was a company incorporated under Italian law with registered office in Italy and owned by Sielna, another Italian company with shareholders who were not Russian nationals.

I.5. Opera Laboratori Fiorentini lodged an appeal against the judgment of the Regional Administrative Court before the Consiglio di Stato (Council of State, Italy), contesting the decision and resubmitting its original pleas in law.

By the second plea in law, relevant to the reference for a preliminary ruling, the applicant criticised the decision on the interpretation of Article 5k of Regulation (EU) 2022/576.

[...] [*procedure*]

I.6. The Council of State [*procedure*] [...] held that the question on the interpretation of that provision of the EU regulation is objectively uncertain and that it is relevant for the purposes of settling the dispute [...]

[...]. [*procedure*]

II. *The relevance of the question on interpretation*

II.1. It has been established that, at the time of participation in the tender, Scudieri International had a board of directors composed of three members, two of whom were Russian nationals; one of them, Mr MT, chairman of the board of directors and chief executive officer of Scudieri, was also the sole director of the parent company Sielna, which held a 90% stake in Scudieri.

The two companies are both governed by Italian law with registered office in Italy; none of the shareholders are Russian nationals.

II.2. The applicant Opera Laboratori Fiorentini, ranked second, submits that Scudieri International, the successful tenderer, should have been excluded from the tender, since Article 5k of Regulation (EU) 2022/576 prohibits the award of contracts to economic operators acting ‘on behalf or at the direction’ of a Russian national and, in the present case, the successful tenderer is ‘at the direction’ of a Russian ‘entity’, namely the chairman of the board of directors and chief executive officer.

II.3. The plea is relevant because [...] if upheld, the contested award decision would have to be set aside and the tender would have to be awarded to the applicant, Opera Laboratori Fiorentini.

III. *Relevant provisions of [European Union] law and national law*

III.1. Article 215 TFEU provides: ‘1. Where a decision, adopted in accordance with Chapter 2 of Title V of the Treaty on European Union, provides for the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries, the Council, acting by a qualified majority on a joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission, shall adopt the necessary measures. It shall inform the European Parliament thereof.

2. Where a decision adopted in accordance with Chapter 2 of Title V of the Treaty on European Union so provides, the Council may adopt restrictive measures under the procedure referred to in paragraph 1 against natural or legal persons and groups or non-State entities.

3. The acts referred to in this Article shall include necessary provisions on legal safeguards.’

Article 288 TFEU provides: ‘A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.’

Recital 3 of Regulation (EU) 2022/576 recalls that Decision (CFSP) 2022/578 extended ‘the list of controlled items which might contribute to Russia’s military and technological enhancement or the development of its defence and security sector’ and recital 4 specifies that it prohibited ‘the award and continued execution of public contracts and concessions with Russian nationals and entities or bodies established in Russia’.

Article 5k of Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, inserted by Regulation (EU) 2022/576, provides:

‘It shall be prohibited to award or continue the execution of any public or concession contract falling within the scope of the public procurement Directives, as well as Article 10, paragraphs 1, 3, 6(a) to 6(e), 8, 9 and 10, Articles 11, 12, 13 and 14 of Directive 2014/23/EU, Article 7 and 8, Article 10 (b) to (f) and (h) to (j) of Directive 2014/24/EU, Article 18, Article 21 (b) to (e) and (g) to (i), Articles 29 and 30 of Directive 2014/25/EU and Article 13 (a) to (d), (f) to (h) and (j) of Directive 2009/81/EC, to or with:

(a) a Russian national, or a natural or legal person, entity or body established in Russia;

(b) a legal person, entity or body whose proprietary rights are directly or indirectly owned for more than 50% by an entity referred to in point (a) of this paragraph;

or (c) a natural or legal person, entity or body acting on behalf or at the direction of an entity referred to in point (a) or (b) of this paragraph, including, where they account for more than 10% of the contract value, subcontractors, suppliers or entities whose capacities are being relied on within the meaning of the public procurement Directives.’

III.2. With regard to the administration of public limited companies (*società per azioni*), Article 2380a of the codice civile (Italian Civil Code) provides that ‘the undertaking shall be managed in accordance with the provisions of the second paragraph of Article 2086 and is the sole responsibility of the directors, who shall carry out the necessary operations to give effect to the corporate purpose. The establishment of the structures referred to in the second paragraph of Article 2086 shall be the sole responsibility of the directors.

2. The administration of the company may also be entrusted to non-members.

3. When the administration is entrusted to several persons, they shall form the board of directors.

4. If the articles of association do not specify the number of directors, but only stipulate a maximum and minimum number, the decision shall lie with the general meeting.

5. The board of directors shall choose the chairman from among its members, if the chairman is not appointed by the general meeting.’

Articles 2475 and 2475a of the Italian Civil Code apply to limited liability companies (*società a responsabilità limitata*) such as Scudieri International. Those provisions state, inter alia, that directors have sole responsibility for management of the structures referred to in the second paragraph of Article 2086 and that directors are responsible for the administration and general representation of the company.

In relation to the direction and coordination of capital companies, Article 2497 of the Italian Civil Code also provides as follows:

‘1. Companies or entities that, in exercising the activity of direction and coordination of companies, act in their own or others’ business interests contrary to the principles of sound corporate and business management of those companies, shall be directly liable to their shareholders for the loss of profitability and value of the shareholding, and to the creditors of the company for the damage caused to the integrity of the company’s assets. There shall be no liability in the absence of any damage in the light of the overall result of the direction and coordination activity or if the damage is fully rectified, including as a result of actions taken for that purpose.

2. Any person who participated in the harmful event and any person who knowingly benefited therefrom, to the extent that they procured an advantage, shall be jointly and severally liable.

3. Shareholders and creditors of the company may only take action against the company or entity that exercises the direction and coordination activity if their claims have not been satisfied by the company subject to the direction and coordination activity.

4. In the event that a company subject to direction and coordination by another company is wound up by a court or placed in compulsory or special administration, the action available to its creditors shall be taken by the insolvency administrator, liquidator or special commissioner.’

For the direction and coordination of companies, the presumption of Article 2497e of the Italian Civil Code applies, according to which ‘for the purposes of this section, it is presumed, unless there is evidence to the contrary, that the direction and coordination of companies is carried out by the company or entity required to consolidate their financial statements or that otherwise controls them within the meaning of Article 2359 of the Italian Civil Code’.

IV. *The different interpretations*

IV.1. According to the successful tenderer, the purpose of Regulation 2022/576 is to prevent the financing of Russia's war. It thus concerns the entity awarded the public contract, or the actual recipient of the award.

To that end, it draws a parallel with EU rules on the screening of foreign direct investments (FDI), which takes into account the foreign investor. Recital 10 of Regulation (EU) 2019/452 provides that 'Member States that have a screening mechanism in place should provide for the necessary measures, in compliance with Union law, to prevent circumvention of their screening mechanisms and screening decisions. This should cover investments from within the Union by means of artificial arrangements that do not reflect economic reality and circumvent the screening mechanisms and screening decisions, where the investor is ultimately owned or controlled by a natural person or an undertaking of a third country. This is without prejudice to the freedom of establishment and the free movement of capital enshrined in the TFEU.'

Therefore, it is not the directors' nationality but the shareholders' nationality that counts.

In support of its interpretation, Scudieri International recalls the guidance provided by the Commission in the 'Commission Consolidated FAQs on the implementation of Council Regulation No 833/2014 and Council Regulation No 269/2014'. It points out that on 22 June 2022 (last updated on 31 October 2023), the Commission published the official document (Commission Consolidated FAQs), [...] which on page 290 of the pdf file contains the following guidance on interpretation for a case that it claims is identical to the present case.

Specifically:

'36. Is a company established in Germany with a managing director of Russian nationality and German residence excluded from the award or the fulfilment of public contracts if the threshold value is reached?

Last update: 23 May 2022

No, it is not excluded on the basis of the Sanctions Regulation since the contract is signed with the company which is established in Germany and not with its managing director.'

It submits that the interpretation provided by the Commission is in line with the recommendations of the Council of the European Union (updated on 27 June 2022) on the effective implementation of the restrictive measures adopted under the CFSP.

It emphasises that Regulation (EU) 2022/576 was adopted within the framework of Decision (CFSP) 2022/578 of 8 April 2022 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine.

Having examined the two decisions and the abovementioned recitals 3 and 4 of Regulation (EU) 576/2022, Scudieri International, having confirmed the purpose of the sanctions relating to public contracts to prevent the financing of Russia's war and invasion, concludes that Article 5k must be interpreted as preventing public contracts from being awarded to Russian-owned companies. It is immaterial who manages the company, provided the company is not Russian-owned.

That finding is confirmed by the French and German versions of the provision, as well as the Italian version, which refers to the 'direction' (*'direzio*ne') of the company, since in Italian company law directors do not *direct* the company but *manage* it.

The concept of '*gestione*' (management) contrasts with that of '*direzio*ne', as demonstrated by the fact that the term '*direzio*ne' is only found in Article 2497 of the Italian Civil Code. That provision lays down rules in the event that a person ('company or entity') carries out 'the activity of direction and coordination of companies', distinguishing it from the management activity per se.

IV.1.1. A similar interpretation is adopted by the Avvocatura Generale dello Stato (Italian State Legal Advisory Service), in defence of the contracting authority, the Ministry of Culture and Uffizi Gallery.

In addition to Article 2497 of the Italian Civil Code, reference is made to Article 2497e of the Italian Civil Code, to reiterate that the *direction and coordination activity* is the one presumed to be carried out by the parent company vis-à-vis its subsidiary, whereas the directors are responsible for the *management* of the company.

To illustrate the concept of 'direction', reference is made to judgment No 15276 of 1 June 2021 of the Corte di Cassazione (Supreme Court of Cassation, Italy), the grounds of which refer extensively to Article 2497 of the Italian Civil Code.

According to the contracting authorities, point (c) of Article 5k of the regulation also refers to the concept of 'direction', coinciding with that referred to in the Italian Civil Code and in national case-law. That finding is supported by the wording of the regulatory provision, which equates the company acting 'on behalf' of another natural or legal person to a company acting 'at the direction' of another entity. It is also confirmed in the systemic reading of the provision, which is intended to prevent public contracts from being awarded to companies that by virtue of their corporate structure (point (b)) or owing to other constraints (point (c)) are under the dominant influence of Russian 'entities'.

According to that interpretation, the reference to a ‘natural person’ in point (c), in so far as it refers to point (a), is understood by the State Legal Advisory Service as referring to the holding company or natural person involved in the direction of the company, as defined above.

In the light of the foregoing:

- it is material that neither of the two Russian nationals who make up the board of directors of Scudieri International – Messrs MT and HK – are shareholders of the holding company that controls the company or hold shares in the company;

- conversely, it is immaterial that Mr MT is a director of the parent company Sielna, since the director of the parent company is not involved in the ‘direction’ of the subsidiary, given that the power of direction and coordination of that company lies solely with the parent company.

III.2. Opera Laboratori Fiorentini differs in its interpretation of point (c) of Article 5k of the regulation, with reference to the preceding point (a).

Opera Laboratori Fiorentini recalls Article 215 TFEU in order to affirm that the contested provision relies on a broad scope of interpretation, so as not to be limited by quirks of individual legal systems – the aim being to suspend, in whole or in part, economic and financial relations with Russia.

The broad scope of the provision is inferred from point (a), where the subjective scope refers to ‘a Russian national, or a natural or legal person, entity or body established in Russia’, so that the prohibition on awarding or executing contracts is not precluded during transposition in the individual Member States by the variety of legal entities recognised in national legal systems.

By the same logic, the applicant contends that the objective scope of the provision has been identified. Indeed, to ensure the uniform effectiveness of the sanction in all EU Member States pursuant to Article 29 TEU, that scope is defined in such a way as to encompass a wide range of criteria covering relationships, situations and status, according to which the abovementioned persons are prohibited from participating in selection procedures and entering into contracts on the basis of the place of establishment (in Russia) (point (a)); the situation as regards proprietary rights (point (b)); and the fact of acting ‘on behalf or at the direction of’ an entity (point (c)).

It follows that the spirit and purpose of the provision – and of point (c) in particular – should also be interpreted in the light of the systemic placement of point (c) relative to points (a) and (b), which would otherwise duplicate the first two points.

The basic position of Opera Laboratori Fiorentini is that the term ‘direction’ can only refer to the power of direction, control, supervision, administration or

management, and thus any de facto influence exercised by a Russian ‘entity’/person (natural person, legal person, entity or body).

In its opinion, this interpretation is in line with the general and abstract scope of the regulation, as characterised in the context of the sources of EU law, so as to determine subjective legal situations for persons governed by private law both in horizontal relationships and in relationships with the institutions of the Member States and the EU. The direct applicability of the regulation is also inferred from its mandatory nature, without the need for internal adaptation, and by its full applicability.

Hence the finding that the term ‘direction’ in point (c) of Article 5k cannot be interpreted restrictively according to the guidance taken from the national legislation as ‘direction and coordination’ under Article 2497 of the Italian Civil Code, this being an instrument of national law. In any event, the national rule is inapplicable since it concerns cases of liability, whereas the EU regulatory provision relates to a ban, which goes far beyond the concept of companies and relationships of control between companies, as confirmed by the fact that Article 5k makes no mention of the word ‘company’, but instead uses the abovementioned terms, so as to broaden the subjective scope.

The alternative interpretation is based on the erroneous assumption that the regulation must be interpreted in the light of the national rule governed by civil law, contrary to the principle of direct application of the regulation to the Member States.

The applicant adds that, even if the other party’s restrictive approach were to be followed by making the concept of ‘direction’ referred to in the regulation coincide with that of ‘direction and coordination’ under national law, it is actually judgment No 15276/2021 of the Supreme Court of Cassation, cited by the State Legal Advisory Service, that establishes the role of ownership within the context of the powers of direction and coordination, that role being exercised through the right to vote at the general meeting, thus emphasising the aspect of management or administration of the company. The applicant submits that this is decisive in the present case, given that the sole director of the parent company, which holds a 90% stake in its subsidiary, is a Russian national.

V. Wording of the question and stay of the proceedings

V.1. The opposing positions of the parties explain the underlying reasons for the two possible interpretations of Article 5k(c), regarding the concept of ‘direction’ in relation to the preceding points (a) and (b).

In that regard, casting further doubt on the interpretation, it should be noted that, while it is assumed that the successful tenderer Scudieri International falls within the concept of ‘legal person’ referred to in the first part of point (c), it is not clear whether the ‘direction’ referred to in the second part is material only if exercised by an ‘entity’ other than a natural person who has Russian nationality or if the

expression ('entity') is used in point (c) to cover the entire range of persons referred to in the preceding points (a) and (b).

The interpretation is objectively uncertain and, since it concerns an essential question on which – given the new rule introduced by Regulation 2022/576 – there is no case-law of the Court of Justice allowing the disputed point of law to be resolved, clarification must be sought.

We therefore refer the following question to the Court of Justice for a preliminary ruling pursuant to Article 267 TFEU, relevant to the decision to be given in the main proceedings:

'Must Article 5k(c) of Regulation (EU) 833/2014, introduced by Regulation (EU) 2022/576, concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, in so far as it prohibits the award and continued execution of public contracts and concessions to or with 'a natural or legal person, entity or body acting on behalf or at the direction of an entity referred to in point (a) or (b) of this paragraph, including, where they account for more than 10% of the contract value, subcontractors, suppliers or entities whose capacities are being relied on within the meaning of the public procurement Directives', be interpreted as meaning that the prohibition applies to a company incorporated under Italian law with registered office in Italy, owned by an Italian company and with shareholders who are natural persons and who are not Russian nationals, but of which two of the three members of the board of directors are Russian nationals and one of whom, the chairman and chief executive officer, is also the sole director of the parent company which holds a 90% stake in that company?'

[...] [stay of proceedings, reservation of costs, instructions to the registry and request for anonymisation]

[...] Rome [...] 25 January 2024 [...]