

Case C-631/21**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:**

14 October 2021

Referring court:

Gerechtshof's-Hertogenbosch (Netherlands)

Date of the decision to refer:

5 October 2021

Appellant:

Taxi Horn Tours BV

Respondents:

Gemeente Weert

Gemeente Nederweert

Touringcars VOF

Subject matter of the main proceedings

Appeal against a decision in interim proceedings in a procurement procedure. The appellant challenged at first instance the decision of two municipalities ('the municipalities') to award a contract to a vennootschap onder firma (general partnership; 'VOF') which had submitted only one European Single Procurement Document ('ESPD'). According to the appellant, each of the two partners of the VOF should have submitted an ESPD.

Subject matter and legal basis of the request

Interpretation of EU law pursuant to Article 267 TFEU

Questions referred for a preliminary ruling

1. If collaborating persons (natural persons and/or legal persons) operate a joint undertaking (in this case in the form of a general partnership):
 - must each of the collaborating persons then submit a separate European Single Procurement Document; or
 - must each of the collaborating persons and their joint undertaking then submit a separate European Single Procurement Document; or
 - does only the joint undertaking need to submit one European Single Procurement Document?
2. Does it make a difference in this regard:
 - whether the joint undertaking is temporary or not temporary (enduring);
 - that the collaborating persons are themselves economic operators;
 - that the collaborating persons operate their own undertakings which are similar to the joint undertaking, or at least are active in the same market;
 - that the joint undertaking is not a legal person;
 - that the joint undertaking may have (recoverable) assets that are separate (from the assets of the partners);
 - whether the joint undertaking has the authority under national law to represent the collaborating persons in answering the questions of the European Single Procurement Document;
 - that under national law, in the case of a general partnership, it is the partners who assume the obligations arising from the contract and are jointly and severally liable for fulfilling them (and not therefore the general partnership itself)?
3. If several of the factors mentioned under 2 are significant, how do they relate to each other? Are certain factors more significant than other factors or even of decisive significance?
4. Is it correct that, in the case of a joint undertaking, a separate European Single Procurement Document is in any event required from a collaborating person if the execution of the contract will (also) involve the use of resources that belong to that person's own undertaking (such as staff and business assets)?

5. Does the joint undertaking have to meet certain requirements in order to be considered a single economic operator? If so, what are those requirements?

Provisions of European Union law relied on

Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65), Articles 2, 19, 59 and 63.

Commission Implementing Regulation (EU) 2016/7 of 5 January 2016 establishing the standard form for the European Single Procurement Document (OJ 2016 L 3, p. 16).

Provisions of national law relied on

Aanbestedingswet 2012 (Law on Procurement of 2012), Articles 2.52, 2.84, 2.85; Aanbestedingsbesluit (Decree on Procurement), Article 2; Burgerlijk Wetboek (Civil Code), Article 7A: 1655; Wetboek van Koophandel (Commercial Code), Articles 16, 17(1), 18.

Succinct presentation of the facts and procedure in the main proceedings

- 1 In this judgment, the Gerechtshof (Court of Appeal) has decided to refer questions to the Court of Justice for a preliminary ruling in the context of an appeal against a judgment in interim proceedings brought by Taxi Horn against the municipalities, in which Touringcars VOF ('Touringcars') is an intervening party.
- 2 On 28 February 2019, the municipalities initiated a European public procurement procedure for the transport of primary school pupils for the purposes of physical education ('gymnastics transport') in the period from 2020 to the end of the 2027-2028 school year. The award criterion was the most economically advantageous tender.
- 3 The procurement documents included the Tender Instructions that the municipalities had drawn up for this procurement. Among other things, this document provided as follows:

"1.9 Signing authority

An officer who is authorised to represent and bind the company must sign the completed Self-Declaration (ESPD – European Single Procurement Document), tender and annexes. By signing, the signatory guarantees the correctness and validity of the entire tender.

(...)

1.18 Tendering

(...)

Tendering in groups of several carriers is also permitted. The group must meet the requirements set. If you tender as a group, the group must designate a coordinator. Each group member is jointly and severally liable for the performance of the transport agreement. The tenders of group members must show how the continuity of the gymnastics transport will be guaranteed if one or more group members cannot fulfil their responsibilities.

(...)

2.1 Number of copies/completeness

(...)

The tender must be complete and include the following documents:

- A duly completed and validly signed Self-Declaration (ESPD, Annex 2); the ESPD is a pdf file that must be completed and that we have made available via TenderNed.”

4 On 11 November 2019, it became apparent that only Taxi Horn and Touringcars had submitted a tender. The Touringcars tender was submitted by [F]. [F] submitted one ESPD on behalf of Touringcars.

5 Touringcars is a general partnership of unlimited duration established on 1 January 2011. According to the handelsregister (trade register), Touringcars has 82 employees and its activities comprise “occasional passenger transport by road, transport by taxi and trade in and repair of passenger cars and light commercial vehicles”. The partners in Touringcars are [K] B.V. and [F] Touringcars B.V. The director of Touringcars is [F], with full authority to act. The two partners operate their own transport companies. The managing director of the partner [K] B.V. is [K]. [F] is the authorised representative of [K] B.V., with the title of commercial director. According to the trade register, [K] B.V. has 39 employees. The sole managing director and shareholder of the partner [F] Touringcars B.V. is [F] Beheer B.V. According to the trade register, [F] Touringcars B.V. does not have any staff.

6 By letter of 27 January 2020, [K] stated, inter alia:

“On 5 January 2011, I, as sole and independent authorised director of [K] B.V., granted Mr [F] full authorisation to represent [K] B.V. (...) Although Mr [F] and I have regular consultations about the ins and outs of the company(-ies) associated with [K] B.V., I have left the entire management to him from that date. With regard to the latter, I also note that, from 1 January 2011, [K] B.V. entered into a general partnership with [F] Touringcars B.V. under the name Touringcars

V.O.F. In the context of that association, Mr. [F] and I also have regular consultations, but he is the one who actually runs the undertaking.”

- 7 By letters of 3 and 5 December 2019, the municipalities notified Taxi Horn that they were awarding the contract to Touringcars.
- 8 Taxi Horn brought proceedings for interim relief against that award. Touringcars intervened in those interim proceedings. The judge hearing applications for interim relief found in favour of Taxi Horn.
- 9 The municipalities subsequently concluded agreements for gymnastics transport with Touringcars. These agreements came into effect on 1 March 2020.
- 10 The question raised on appeal is whether it sufficed that Touringcars submitted a single ESPD, or whether the two partners should each have submitted a separate ESPD.

Essential arguments of the parties to the main proceedings

- 11 Taxi Horn submits, inter alia, that Touringcars is a permanent association between the partners’ undertakings and thus constitutes a group of undertakings. It is therefore important that the conduct and declarations of each partner must be able to be verified by means of an individual ESPD.
- 12 According to the municipalities, it does not follow from EU and national legislation that each partner in a general partnership must submit a European Single Procurement Document (ESPD).
- 13 The municipalities argue that a distinction should be made between temporary and permanent associations. In EU public procurement law, a group of economic operators refers to a temporary association. A general partnership is a partnership as referred to in recital 14 of Directive 2014/24/EU and is therefore, in its entirety, an undertaking and not a group. Moreover, verification of partners can take place by means of Part IIIA of the ESPD.

Succinct presentation of the reasoning in the request for a preliminary ruling

- 14 Directive 2014 /25/EU, which applies, inter alia, to transport services, contains similar provisions (respectively, recitals 17 and 18,; Article 2, introductory wording and paragraph 6 thereof; Article 37(2), Article 80(3), Article 79).

Commission Implementing Regulation (EU) 2016/7 of 5 January 2016 establishing the standard form for the European Single Procurement Document states inter alia:

(1) One of the major objectives of Directives 2014/24/EU and 2014/25/EU is the lessening the administrative burdens of contracting authorities, contracting entities

and economic operators, not least small and medium-sized enterprises. A key element of that effort is the European single procurement document (ESPD). The standard form for the ESPD should consequently be drafted in such a manner that the need to produce a substantial number of certificates or other documents related to exclusion and selection criteria is obviated. With the same objective in mind, the standard form should also provide the relevant information in respect of entities on whose capacities an economic operator relies, so that the verification of that information can be carried out together with the verification in respect of the main economic operator and on the same conditions.

Annex 1

Instructions

The ESPD is a self-declaration by economic operators providing preliminary evidence replacing the certificates issued by public authorities or third parties. As provided in Article 59 of Directive 2014/24/EU, it is a formal statement by the economic operator that it is not in one of the situations in which economic operators shall or may be excluded; that it meets the relevant selection criteria and that, where applicable, it fulfils the objective rules and criteria that have been set out for the purpose of limiting the number of otherwise qualified candidates to be invited to participate. Its objective is to reduce the administrative burden arising from the requirement to produce a substantial number of certificates or other documents related to exclusion and selection criteria.

(...)

An economic operator participating **on its own** and which **does not rely on the capacities** of other entities in order to meet the selection criteria, must fill out one ESPD.

An economic operator participating **on its own** but **relying on the capacities** of one or more other entities must ensure that the contracting authority or contracting entity **receives** its own ESPD together with a **separate** ESPD setting out the relevant information for **each of the entities it relies on**.

Finally, where groups of economic operators, including temporary associations, participate together in the procurement procedure, **a separate** ESPD setting out the information required under Parts II to V must be given for **each** of the participating economic operators.

In all cases where more than one person is member of the administrative, management or supervisory body of an economic operator or has powers of representation, decision or control therein, each **may have to** sign the same ESPD, depending on national rules, including those governing data protection.

- 15 The procurement directives were transposed in Netherlands law in the Law on Procurement of 2012.

16 Article 2.52(3) and (4) of the Law on Procurement provides as follows:

“3. An association of economic operators can submit a tender or apply as a candidate.

4. A contracting authority shall not require an association of economic operators to have a specific legal form in order to submit a tender or a request to participate.”

17 Article 2.84(1) and (2) of this law provides as follows:

“A self-declaration is a declaration by an economic operator in which it indicates:

- a. whether any exclusion grounds apply to it;
- b. whether it meets the suitability requirements set out in the notice or in the procurement documents;
- c. whether it complies or will comply with the technical specifications and implementing conditions relating to the environment and animal welfare or which are based on social considerations;
- d. whether and how it meets the selection criteria.

2. The data and information that may be required in a declaration and the model or models for such a declaration shall be laid down by or pursuant to an Order in Council.”

18 Article 2.85(1) of this law provides as follows:

“1. The contracting authority shall require an economic operator to submit, together with its request to participate or its tender, a self-declaration using the appropriate model, and shall specify the data and information to be contained in the self-declaration.”

(...)

19 The Decree on Procurement provides as follows in so far as is relevant here:

Article 2

1. The self-declaration referred to in Article 2.84 of the Law shall include at least the following data:

- a. data on the contracting authority or the special-sector business and on the procurement procedure;
- b. data on the economic operator;

- c. a declaration regarding grounds of exclusion;
- d. a declaration regarding the suitability requirements set and a declaration regarding technical specifications and performance conditions relating to the environment;
- e. a declaration on how the selection criteria are being met;
- f. a declaration regarding the correctness of the completed self-declaration and the authority of the signatory;
- g. the date and the signature.

(...)

3. The model or models for the self-declaration shall be laid down by an Order in Council. (...)"

- 20 Touringcars has the legal form of a general partnership. Like the (professional) partnership (maatschap) and the limited partnership (commanditaire vennootschap), the general partnership is a form of partnership (personenvennootschap).
- 21 In his ruling of 31 January 2020 (ECLI:NL:PHR:2020:97) (numbers 3.3-3.8), the procureur-generaal (Procurator General) at the Hoge Raad (Supreme Court) described a partnership (personenvennootschap) as follows:

“The different types of partnership

3.3 Our law recognises three types of partnership: the (professional) partnership (maatschap), the general partnership (vennootschap onder firma) and the limited partnership (commanditaire vennootschap; ‘CV’). These are forms of association entered into by agreement, and unlike the legal persons listed in Book 2 of the Civil Code, they do not involve institutions. At the same time they are sometimes, and perhaps it could be said, to an increasing extent, to be regarded as entities, so that the question of legal personality and/or legal subjectivity arises (more emphatically). The VOF and the CV are qualified forms of partnership.

3.4 The (professional) partnership (maatschap) is defined by the legislature in Article 7A: 1655 of the Civil Code: ‘Partnership is an agreement, whereby two or more persons bind themselves to contribute something to a community, with the aim of sharing the resulting benefit with each other.’

A partnership may be ‘silent’ or ‘public’; the determining factor is whether or not it trades under a common name. If it trades under a common name, it is public. If that is not the case, it is called ‘silent’; third parties are therefore not aware of the existence of the partnership (so that they do not contract with ‘the partnership’).

The VOF and the CV are both species of the genus public partnership (openbare maatschap). In Article 16 of the WvK¹ the VOF is defined as follows:

‘A general partnership is the partnership entered into to operate a business under a common name.’ (...)

3.5 It follows from a combined reading of the aforementioned Article 16 of the Commercial Code and Article 7A: 1655 of the Civil Code that the VOF:

- a) is an agreement,
- b) aimed at the collaboration between two or more persons,
- c) who bind themselves to contribute something to a community,
- d) in order to achieve a common benefit,
- e) with the collaboration serving to operate a business, and
- f) which is entered into under a common name.

The law sets no formal requirements for the formation of a partnership (maatschap), a VOF and a CV. As soon as the association meets the description of Article 7A:1655 of the Civil Code and/or Article 16 or 19 of the Commercial Code, it can be classified as a partnership (maatschap), a VOF or a CV. In addition, for the VOF (and the CV), the law also stipulates that it must be entered into by a publicly or privately executed deed (Article 22 of the Commercial Code) and that it must be registered in the trade register (Article 23 of the Commercial Code), but these are not constitutive requirements. The deed requirement has a purely evidential function (Article 157 Rv²) and the registration requirement serves to protect third parties (legal certainty).

Representative authority and joint and several liability of the partners

3.6 Article 17(1) of the Commercial Code stipulates that, unless contractually agreed otherwise, each partner is authorised to act on behalf of the VOF.

“Each of the partners, who is not excluded from doing so, is authorised to act in the name of the partnership, to expend and receive monies, and to bind the company to third parties, and third parties to the company.”

As far as the legal consequences are concerned, Article 18 of the Commercial Code is important:

¹ Wetboek van Koophandel (Commercial Code).

² Wetboek van Burgerlijke Rechtsvordering (Code of Civil Procedure).

‘In general partnerships, each partner is jointly and severally liable for the obligations of the partnership.’

The partners are therefore jointly and severally liable within the meaning of Article 6:6(2) of the Civil Code, which means that each partner is fully liable for the debts of the partnership.”

- 22 In its judgment of 19 April 2019, ECLI:NL:HR:2019:649 (*UWV v bewindvoerder*), the Supreme Court took the following as its point of departure with regard to the VOF:

“3.4.1

A VOF is a legal relationship entered into by agreement for the purpose of operating a business under a common name in an enduring association (see Article 16 of the Commercial Code in conjunction with Article 7A:1655 of the Civil Code). Under current law, the VOF does not have legal personality. Nevertheless, to a certain extent, legislation and case-law accord a degree of autonomy to the VOF in judicial matters as compared to the individual partners. For example, a VOF can institute legal proceedings in its own name (Article 51(2) of the Code of Civil Procedure) and can be declared bankrupt in its own name (Article 4(3) of the Fw³). Furthermore, according to the settled case-law of the Supreme Court, the partners’ assets intended for conducting the business of the VOF are separated from their private assets. Debts incurred within the framework of the business conducted by the VOF can be recovered from this separated capital. The bankruptcy of a VOF relates to the liquidation and distribution of the separated capital and does not always and automatically imply the bankruptcy of the partners. (...)

3.4.2

The lack of legal personality means that a VOF is not an independent bearer of subjective rights and obligations. When a partner acts in the name of the VOF (which every partner is in principle authorised to do pursuant to Article 17 of the Commercial Code), he acts on behalf of the joint partners and binds the joint partners. An agreement ‘with the VOF’ must therefore be regarded as an agreement with the joint partners in their capacity as partners (...).

3.4.3

Article 18 of the Commercial Code stipulates that each of the partners is jointly and severally liable for the obligations of the company. This provision means that each partner is liable for the entirety of the obligations of the joint partners in their capacity as partners. Article 18 of the Commercial Code therefore constitutes an exception to the principle set out in Article 6:6(1) of the Civil Code that if a

³ Faillissementswet (Law on Bankruptcy).

performance is owed by two or more debtors, they are each liable for an equal part. Article 18 of the Commercial Code therefore creates a joint and several liability for the partners among themselves and not a joint and several liability for each partner with the VOF (the joint partners).

3.4.4

A creditor of the joint partners can enforce his claim both against the joint partners ('against the VOF') and against each partner individually. A creditor of the partnership thus has two concurrent rights of action against each partner: one against the joint partners ('against the VOF'), which is recoverable from the separated assets of the VOF, and one against the partner personally, which is recoverable from the private assets of that partner. A partner cannot invoke the defences that he is personally entitled to against the first claim, but he can invoke them against the second claim. A judgment given in the name of the VOF, allowing a claim only against the VOF, cannot become *res judicata* against a partner personally and cannot be enforced against his private assets. A creditor of the VOF can bring an action both against the VOF (the joint partners in their capacity as such) and against one or more partners in private; he can also do both – consecutively or concurrently. (...).”

- 23 The partners ([K] B.V. and [F] Touringcars B.V.) are economic operators who, with their own individual undertakings, are also active in the same market as the undertaking (the general partnership) which has tendered for the contract (Touringcars). Taxi Horn has argued that Touringcars makes use of resources which are made available to it from the partners' own undertakings. The municipalities have refuted that argument.
- 24 It is important that the contracting authority be able to verify whether the economic operator wishing to perform a contract must be excluded and whether it meets the requirements of suitability, specific conditions and selection criteria. If persons collaborate on an enduring basis under a common name in a separate, joint undertaking, the question arises whether the verification may be limited to the joint undertaking only or whether the verification should also cover each of the collaborating persons.
- 25 The key question is whether it suffices that an economic operator submits a single ESPD where persons (natural and/or legal) are in a collaborative relationship within it. This requires an interpretation of Articles 2, 19, 59 and 63 of Directive 2014/24/EU and of Implementing Regulation (EU) 2016/7.