

**Case C-68/21**

**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:**

3 February 2021

**Referring court:**

Consiglio di Stato (Council of State, Italy)

**Date of the decision to refer:**

14 December 2020

**Appellant:**

Iveco Orecchia SpA

**Respondents:**

APAM Esercizio SpA

Veneta Servizi International Srl unipersonale

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**Subject matter of the main proceedings**

Appeal proceedings brought by an unsuccessful tenderer against a judgment of the Tribunale amministrativo regionale per la Lombardia (Regional Administrative Court, Lombardy, Italy) concerning the award of a public contract for the supply of replacement parts for buses to a tenderer who had submitted a tender accompanied not by type-approval certificates but by declarations of equivalence to the type-approved original – declarations made by the tenderer, purporting to be a manufacturer.

**Subject matter and legal basis of the reference**

Interpretation of Articles 3, 10, 19 and 28 of and Annex IV to Directive 2007/46/EC of the European Parliament and of the Council of 5 September 2007 establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles.

## Questions referred for a preliminary ruling

1. Is it compatible with EU law, and in particular with the provisions of Directive 2007/46/EC (laid down in Articles 10, 19 and 28 of that directive) and the principles of equal treatment and impartiality, open competition and sound administration, for – with specific reference to the supply through public procurement of replacement parts for buses intended for public service – a contracting authority to be allowed to accept replacement parts intended for a particular vehicle, made by a manufacturer other than the vehicle manufacturer, and therefore not approved together with the vehicle, falling into one of the categories of components covered by the technical rules listed in Annex IV to that directive (List of requirements for the purpose of EC type-approval of vehicles) and put to tender without being accompanied by the type-approval certificate and without any information on the actual type-approval, and indeed on the assumption that type-approval is not needed, as only a declaration of equivalence to the type-approved original made by the tenderer is sufficient?

2. Is it compatible with EU law, and in particular Article 3(27) of Directive 2007/46/EC to allow – in relation to the supply through public procurement of replacement parts for buses intended for public service – an individual tenderer to describe itself as ‘manufacturer’ of a specific non-original replacement part intended for a particular vehicle, especially where it falls into one of the categories of components covered by the technical rules listed in Annex IV (List of requirements for the purpose of EC type-approval of vehicles) to Directive 2007/46/EC, or must that tenderer prove – for each of the replacement parts thus subject to tender and in order to certify their equivalence to the technical specifications of the tender – that it is the entity who is responsible to the approval authority for all aspects of the type-approval and for ensuring conformity of production and the related level of quality and is directly involved in at least some of the stages of the construction of the component which is the subject of the approval, and if so, by what means is such proof to be provided?

## Provisions of EU law relied on

Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, and in particular Article 34.

Directive 2007/46/EC, cited above.

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, specifically Articles 42, 44 and 62.

### Provisions of national law relied on

Decreto legislativo del 18 aprile 2016, n. 50 (GURI n. 91 del 19 aprile 2016 – Supplemento ordinario n. 10) («Codice dei contratti pubblici») (Legislative Decree No 50 of 18 April 2016 (*Gazzetta ufficiale della Repubblica italiana* No 91 of 19 April 2016 – Ordinary Supplement No 10) ('Public Procurement Code')), in particular the following articles:

Article 68:

‘1. The technical specifications as defined in point 1 of Annex XIII shall be set out in the procurement documents and shall lay down the characteristics required of a works, service or supply. Those characteristics may also refer to the specific process or method of production or provision of the requested works, supplies or services or to a specific process for another stage of their life cycle even where such factors do not form part of their material substance, provided that they are linked to the subject matter of the contract and proportionate to its value and its objectives. ...

5. ... The technical specifications shall be formulated in one of the following ways: ...; (b) by reference to technical specifications and, in order of preference, to standards transposing European standards, European Technical Assessments, common technical specifications, international standards, other technical reference systems established by the European standardisation bodies or, failing that, national standards, technical approvals or technical specifications relating to the design, calculation and execution of the works and use of the supplies. Each reference shall be accompanied by the words “or equivalent”; (c) in terms of performance or functional requirements as referred to in point (a), with reference to the technical specifications referred to in point (b) as a means of presuming conformity with such performance or functional requirements; (d) by reference to the technical specifications referred to in point (b) for certain characteristics and by reference to the performance ...

...

7. Where a contracting authority uses the option of referring to the technical specifications referred to in point (b) of paragraph 5, it shall not declare inadmissible or reject a tender on the grounds that the works, supplies or services tendered for do not comply with the technical specifications to which it has referred, once the tenderer demonstrates in its tender by any appropriate means, including the means of proof referred to in Article 86, that the solutions proposed satisfy in an equivalent manner the requirements defined by the technical specifications.’

Article 86, according to which the following are valid means of proof of the technical specifications: ‘a test report from a conformity assessment body or a certificate issued by such a body’ or ‘a technical dossier from the manufacturer’.

Decreto legislativo del 30 aprile 1992, n. 285 (GURI n. 114 del 18 maggio 1992 – Supplemento ordinario n. 74) («Nuovo Codice della Strada») (Legislative Decree No 285 of 30 April 1992 (*Gazzetta ufficiale della Repubblica italiana* No 114 of 18 May 1992 – Ordinary Supplement No 74) ('New Highway Code')), in particular the following articles:

Article 75(3):

'The vehicles referred to in paragraph 1, their components or separate technical units manufactured in series, shall be subject to type-approval'.

Article 72(13) penalises anyone driving a vehicle to which non-approved components are fitted.

Article 77(3-*bis*) lays down administrative fines for 'anyone who imports, produces for placing on the market in the national territory or places on the market systems, components and separate technical units without the prescribed type-approval or approval pursuant to Article 75(3-*bis*)'. This rule also provides for the seizure and confiscation of the 'components referred to in this paragraph' (including braking systems) 'even if fitted to vehicles'.

Decreto del Presidente della Repubblica dell'8 dicembre 2000, n. 445 (GURI n. 42 del 20 febbraio 2001 – Supplemento ordinario n. 30) («Testo unico delle disposizioni legislative e regolamentari in materia di documentazione amministrativa») (Presidential Decree No 445 of 8 December 2000 (*Gazzetta ufficiale della Repubblica italiana* No 42 of 20 February 2001 – Ordinary Supplement No 30) ('Consolidated text of the laws and regulations on administrative documentation')), in particular Article 49, according to which:

'Certificates ... of origin, EC certificates of conformity, trade marks or patents may not be replaced by another document, unless otherwise provided for by the rules applicable to the sector.'

Decreto legislativo del 6 settembre 2005, n. 206 (GURI n. 35 dell'8 ottobre 2005 – Supplemento ordinario n. 162) («Codice del consumo») (Legislative Decree No 206 of 6 September 2005 (*Gazzetta ufficiale della Repubblica italiana* No 35 of 8 October 2005 – Ordinary Supplement No 162) ('Consumer Code')), and in particular Article 3, which defines the producer as 'the manufacturer of goods or the provider of a service, or an intermediary thereof, and the importer of goods or services into the European Union or any other natural or legal person purporting to be a producer by placing its name, trade mark or other distinctive sign on the goods or service'.

Decreto del Ministero delle Infrastrutture e dei Trasporti del 28 aprile 2008, n. 32721 («Omologazione dei veicoli a motore e dei loro rimorchi») (GURI n. 162 del 12 luglio 2008 – Supplemento ordinario n. 167) (Decree No 32721 of the Ministry of Infrastructure and Transport of 28 April 2008 ('Approval of motor vehicles and their trailers')) (*Gazzetta ufficiale della Repubblica italiana* No 162 of

12 July 2008 – Ordinary Supplement No 167)), which transposed Directive 2007/46/EC, and in particular Article 3(ff), which defines ‘manufacturer’ as ‘the person or body who is responsible to the approval authority for all aspects of the type-approval process and for ensuring conformity of production’, even if ‘it is not essential that the person or body be directly involved in all stages of the construction of the vehicle, system, component or separate technical unit which is the subject of the approval process’.

### **Succinct presentation of the facts and procedure in the main proceedings**

- 1 The company APAM Esercizio SpA (‘the contracting entity’) held an open procedure for the two-year supply of original Iveco parts or equivalent for buses. Tenders for non-original, equivalent parts were allowed, defined as ‘replacement parts (component parts, equipment) of equivalent quality to the original, or parts of at least equal quality to the components used for the vehicle assembly, manufactured according to the technical specifications and production standards of the manufacturer of the original part’. The technical specifications required the type-approval certificate where this was compulsory.

Three tenderers participated in the tender, including Iveco Orecchia SpA and Veneta Servizi International Srl unipersonale (‘the successful tenderer’).

By decision of 29 January 2019, APAM awarded the tender to Veneta Servizi, which had been placed first in the ranking.

- 2 By application to the Lombardy Regional Administrative Court, Iveco Orecchia, ranked second, challenged that award, the admission to the tender procedure of the successful tenderer, and the contract notice and specifications, in so far as they established the documentary procedures by which the tenderers could provide proof of equivalence of the parts tendered.
- 3 By judgment of 25 June 2019, the Regional Administrative Court dismissed the action, finding that the documentation produced by the successful tenderer to certify the equivalence of the parts were in accordance with the tendering procedure rules and with the applicable EU and national legislation.

Iveco Orecchia appealed against that decision before the Consiglio di Stato (Council of State, Italy), the referring court.

### **Principal arguments of the parties to the main proceedings**

- 4 Iveco Orecchia contests in particular the failure to exclude the successful tenderer from the tender, even though it had not produced type-approval certificates for the equivalent parts tendered and had certified (purporting to be a manufacturer, despite only being a retailer and dealer) the equivalence of products manufactured

in reality by third parties, arguing that only the latter could certify the quality of their products.

- 5 According to Iveco Orecchia, the need to safeguard the public interest in the quality and safety of public transport requires the tenderer to provide, together with the tender, the type-approval certificate or at least detailed information in this regard, and the absence of such documents cannot be remedied simply by declaring the part to be equivalent to the original. Moreover, such a declaration of equivalence should come only from the manufacturer of the replacement part, as the only person with direct knowledge of the product manufacturing process and, as such, the only person able to certify the conformity of the product with the technical specifications set out in the tender.
- 6 According to the respondents, however, the applicable legislation and tendering procedure rules (which are consistent with the legislation) do not prescribe type-approval for replacement parts described as ‘equivalent’ in the tender. They argue that the type-approval certificate is required only with reference to the prototype or to those components that are individually approved for a specific vehicle. For equivalent parts, the certificate of equivalence is thus admissible as an alternative to type-approval.
- 7 Veneta Servizi further submits that the concept of parts manufacturer in the automotive sector corresponds to the definition of producer in the field of consumer goods, that is to say, the manufacturer of goods or the provider of a service, or an intermediary thereof, and the importer of goods or services into the European Union or any other natural or legal person purporting to be a producer by placing its name, trade mark or other distinctive sign on the goods or service. Veneta Servizi contends that it falls into this category, and thus could legitimately certify the equivalence of the parts in question.

#### **Succinct presentation of the reasons for the reference**

- 8 According to the referring court, the first controversial aspect is whether, on the basis of the combined provisions of Directive 2007/46/EC and the national legislation transposing it on the type-approval of vehicles and components, type-approval is required for non-original components manufactured by a component manufacturer (who designs and manufactures individual vehicle components independently). In particular, it is unclear whether, for equivalent parts subject to type-approval and identified by the references made to the rules applicable to the sector in the tendering procedure rules, the tenderer must, for the tender to be accepted, also submit the type-approval certificate as proof of conformity with the original and to enable the part to be used (legally and technically) on the vehicles for which it is intended (or whether the tenderer must at least produce firm evidence of the type-approval of same), or whether a declaration by the tenderer certifying the equivalence to the original of the parts tendered is sufficient as an alternative to the submission of such documentation.

- 9 In relation to this first question, in the view of the referring court, the legislation cited appears to impose on component manufacturers the same obligations as those imposed on vehicle manufacturers (who approve the entire vehicle and, in so doing, automatically approve each component of that vehicle), so that type-approval would also be necessary for the parts and components placed on the market by component manufacturers.
- 10 According to the relevant legislation and case-law, the technical specifications (in this case, the equivalence to the original part of the part tendered by the tenderer) could only be demonstrated by certificates and declarations from the manufacturer, or by other appropriate means of proof, in accordance with the combined provisions of Articles 42 and 44 of Directive 2014/24/EU, Article 34 of Directive 2004/17/EC (referred to by the Court of Justice in its judgment of 12 July 2018, C-14/17), Articles 68 and 86, and Part II of Annex XVII to the Codice dei contratti pubblici (Italian Public Procurement Code).
- 11 The abovementioned legislation also seems to require, for the purpose of recognising equivalence, that the tenderer provide both the declaration of equivalence of the products tendered and the documentation certifying that assumption. However, it could also be argued, as the respondents do, that as an alternative to such documentation, a generic certificate of equivalence is sufficient declaring the conformity of the part with the technical specifications provided for in the tendering procedure rules and the correspondence of the proposed solutions with the requirements thereof.
- 12 The second questionable aspect is the person from whom the certificates of equivalence must originate, and in particular, whether they must necessarily come from the manufacturer of the component tendered, or whether they may also come from the retailer and dealer. In this respect, the correct interpretation of the term ‘manufacturer’, within the meaning of the relevant legislation, is also disputed.
- 13 In relation to this second question, an initial, more restrictive approach conflates the concept of ‘costruttore’ (‘manufacturer’, according to Directive 2007/46/EC) with that of ‘fabbricante’, as defined in the rules applicable to the sector. For example, Article 2.1.1 of UNECE Regulation No 90 defines the term ‘manufacturer’ (‘fabbricante’) as ‘the organization which can assume technical responsibility [for the components] and can demonstrate that it possesses the necessary means to achieve conformity of production.’ This is supported by Article 1(1)(u) of Commission Regulation (EC) No 1400/2002 of 31 July 2002 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector, which defines ‘spare parts of matching quality’ as ‘exclusively spare parts made by any undertaking which can certify at any moment that the parts in question match the quality of the components which are or were used for the assembly of the motor vehicles’.
- 14 According to this view, only the manufacturer may certify the equivalence of the replacement part, since it is precisely the reference to the manufacturer that allows

the product – and, through certification, its technical characteristics – to be identified correctly. Conversely, reference cannot be made, in order to identify the ‘manufacturer’, to other rules that are not relevant to the case at issue, such as consumer law.

- 15 For proponents of the opposite approach, based on the reference to other legislation (such as the rules on consumer protection), a parts manufacturer should not only mean someone who actually manufactures a certain component, but the person who manufactures the product or part of it under his own trade mark, including through assembly or outsourcing to third parties of parts or components, and who is responsible for the warranty in the event of non-conformity of the product. In short, this is not only the person who directly manufactures the required parts, but also the person who assumes responsibility for their use, through certification of equivalence to the original or by providing the warranty for their correct operation and for the absence of construction defects, even if that person is not the owner of the plant or workshop where the part is made and even if he does not participate in the various stages of the construction of the product.
- 16 In the view of the referring court, although the status of manufacturer seems to presuppose participation in at least one of the stages of the production process, the manner in which that status can be proven is still to be clarified: whether the particulars of the certificate of quality and the corporate purpose recorded in the business register are sufficient, or whether the tenderer must demonstrate (and if so, how) the availability of production facilities – whether directly or under contractual agreements – or the fact that all the parts for which it has certified equivalence are manufactured by third parties under its supervision and technical responsibility.
- 17 It is also questionable whether the tendering procedure rules can be understood to mean that the submission and verification of the documents certifying the technical equivalence of the products tendered can be deferred until the contractual performance stage, even for the essential aspects of the tender and the subject matter of the contract, including the technical specifications, or whether the proof of equivalence of the products must be produced at the tendering stage.
- 18 Since the outcome of the action depends on the answers to the questions referred, in that the choice of one or other interpretation will decide the dispute, the reference for a preliminary ruling to the Court of Justice is appropriate.