

**Case C-213/21****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:**

6 April 2021

**Referring Court:**

Consiglio di Stato (Italy)

**Date of the decision to refer:**

18 January 2021

**Applicant and appellant:**

Italy Emergenza Cooperativa Sociale

**Defendant and respondent:**

Azienda Sanitaria Locale Barletta-Andria-Trani

**Subject matter of the main proceedings**

Appeal against the judgment of the Tribunale Amministrativo Regionale (TAR) per la Puglia (Regional Administrative Court, Apulia, Italy) dismissing the applicant's action challenging the decisions taken in the electronic open tendering procedure conducted by the defendant for the award, by direct contracting, of the '118' ambulance service in the territory within the defendant's jurisdiction, and against the decision of the Giunta regionale della Puglia (Regional Executive Body, Apulia, Italy) to admit only voluntary associations to such direct contracting, to the exclusion of other non-profit organisations, including in particular social cooperatives such as the applicant.

**Subject matter and legal basis of the request for a preliminary ruling**

In accordance with Article 267 TFEU, interpretation is sought of Article 10(h) and recital 28 of Directive 2014/24/EU

### **Question referred for a preliminary ruling**

Does Article 10(h) of Directive 2014/24/EU – together with recital 28 of that directive – preclude national legislation which provides that contracts for the provision of emergency ambulance transport services may be directly awarded, on a preferential basis, solely to voluntary organisations – provided that they have been registered for at least six months in the national third sector register, belong to a network of associations and are accredited under the relevant sectoral regional legislation (if any) and on the condition that such an award ensures that the service can be provided within a framework of effective contributions to social goals, which pursues objectives of solidarity, in an economically efficient and appropriate manner and in accordance with the principles of transparency and non-discrimination – to the exclusion of other non-profit organisations, and more specifically social cooperatives, such as non-profit-making social enterprises?

### **Provisions of EU law relied on**

Article 10(h) and recital 28 of 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).

### **Principal provisions of national law relied on**

**Decreto legislativo del 18 aprile 2016, n. 50 – Codice dei contratti pubblici (Legislative Decree No 50 of 18 April 2016 on the Public Contracts Code), Article 17, ‘Specific exceptions for public contracts and service concessions’:** ‘1. The provisions of this code do not apply to public contracts or service concessions in respect of: ... (h) civil defence, civil protection, and danger prevention services that are provided by non-profit organisations or associations ... with the exception of patient ambulance transport services; ...’.

**Decreto legislativo del 3 luglio 2017, n. 117 – Codice del Terzo settore (Legislative Decree No 117 of 3 July 2017 enacting the Third Sector Code)**

**Article 4, ‘Third sector organisations’:** ‘1. Third sector organisations include voluntary organisations, associations for social advancement, philanthropic entities, social enterprises, including social cooperatives, ... and other private-law entities, other than corporations, created for the non-profit-making pursuit of civic objectives or objective of solidarity or social utility, which carry on, exclusively or principally, one or more activities of general interest in the form of voluntary work or the free provision of money, goods or services, or mutual assistance or production, or the exchange of goods or services, and which are registered in the national third sector register.’

**Article 56, ‘Contracts’:** ‘1. Public authorities ... may conclude with voluntary organisations and associations for social advancement which have been registered for at least six months in the national third sector register contracts for the performance, for the benefit of third parties, of activities or social services of general interest where this would be more advantageous than recourse to the market.’

**Article 57, ‘Emergency ambulance transport services’:** ‘1. Emergency ambulance transport services may be awarded, on a preferential basis, by direct contracting, to voluntary organisations which have been registered for at least six months in the national third sector register, belong to a network of associations ... and are accredited under the relevant regional legislation, if any, where, by reason of the particular nature of the service, direct contracting ensures that a service which is in the public interest can be provided within a framework of effective contributions to social goals, which pursues objectives of solidarity, in an economically efficient and appropriate manner and in accordance with the principles of transparency and non-discrimination.

2. The provisions of paragraphs 2, 3, 3a and 4 of Article 56 shall apply to contracts for the services referred to in paragraph 1.’

**Codice civile (Civil Code), Article 2514, ‘Requirements relating to cooperatives that are predominantly mutual’:** ‘Cooperatives that are predominantly mutual shall include in their articles of association: (a) a prohibition on the distribution of dividends on capital invested that would exceed the maximum interest payable on post office savings certificates plus 2.5 percent; ...’.

**Legge del 8 novembre 1991, n. 381 – Disciplina delle cooperative sociali (Law No 381 of 8 November 1991 establishing rules governing social cooperatives), Article 1, ‘Definition’:** ‘1. Social cooperatives shall have the objective of pursuing the general interest of the community in human advancement and the social integration of citizens by means of: (a) the management of social, medical or educational services ... 2. The rules relating to the sector in which the cooperative operates shall apply to every social cooperative, to the extent consistent with this law.’

### **Succinct presentation of the facts and of the procedure**

- 1 Italy Emergenza is a non-profit social cooperative which provides ambulance transport services for patients and disabled persons on behalf of public agencies and bodies belonging to the National Health System. The cooperative states that it is in possession of the necessary authorisations to carry out those activities.
- 2 By an announcement published on 27 April 2020, the Azienda Sanitaria Locale Barletta-Andria-Trani (Barletta-Andria-Trani Local Health Authority; ‘the Health Authority’) launched a comparative procedure for the award of a contract for the

management of the ambulance stations of the ‘118 Emergency Service’ to voluntary associations meeting the requirements set out in Article 57 of Legislative Decree No 117/2017 (the Third Sector Code) and in Law No 11 of 16 March 1994 of the Region of Apulia (implementing the framework law on voluntary work) and registered for at least 6 months in the national third sector register and belonging to a network of associations under Article 41 of the Third Sector Code.

Contracting associations must undertake to provide properly equipped ambulances manned by a driver with emergency response training and one emergency responder, on stand-by 24 hours a day, at the premises or locations identified as appropriate by the Health Authority.

- 3 By its action before the TAR per la Puglia (Regional Administrative Court, Apulia), Italy Emergenza challenged the announcement of the comparative procedure and the decisions relating to it, claiming that they contained unlawful provisions which precluded it from participating, even though it is a social cooperative and has operated on a stable basis for many years in the sector to which the contract relates. In particular, it claimed that Articles 56 and 57 of Legislative Decree No 117/2017 are incompatible with Article 10(h) and recital 28 of Directive 2014/24, on the basis of which social cooperatives are fully equivalent to voluntary associations for the purposes of direct contracting for emergency services, because they are both non-profit organisations.
- 4 That action was dismissed. First of all, the TAR (Regional Administrative Court) held that the service in question was ambulance transport with the provision of case, or ‘qualified’ ambulance transport, such that it fell within the scope of the exemption from the rules on public procurement provided for by Article 10(h) of Directive 2014/24, transposed by Article 17(1)(h) of Legislative Decree No 50/2016. Given that the service in question was an emergency service, the rules governing its award by direct contracting were those of Article 57 of Legislative Decree No 117/2017, which was a *lex specialis*. Consequently, it was permissible for the corresponding contract not to be more advantageous than recourse to the market (Article 56, as *lex specialis*), but it had to fulfil all the conditions listed in Article 57 (registration of the association in the national register, membership of a network, social objective, economic efficiency and appropriateness, and so on).

Given that, the TAR (Regional Administrative Court) found the exclusion of social cooperatives from the possibility of being awarded the contract to be lawful, since they have a business objective, albeit one of mutual assistance, and that justified the difference in treatment brought about by Article 57 of Legislative Decree No 117/2017 by comparison with voluntary associations (those being the only third sector bodies entitled to participate in the comparative procedure). In support of that view, the Regional Court pointed out that, in the present case, Article 5 of the applicant’s articles of association contemplated the distribution of

dividends at a rate of up to 2.5% over the interest rate on post office saving certificates.

- 5 Italy Emergenza brought an appeal against the judgment of the TAR (Regional Administrative Court) before the Consiglio di Stato (Council of State, Italy).

### **Essential arguments of the parties in the main proceedings**

- 6 In its appeal, Italy Emergenza raises again the question of the compatibility with EU law of Articles 56 and 57 of Legislative Decree No 117/2017. It maintains that the judgment under appeal fails to have regard to the fact that, as ‘social’ enterprises, social cooperatives pursue a not-for-profit objective and must reinvest any profits in order to achieve that objective.
- 7 The defendant Health Authority replies that the EU rules to which Italy Emergenza refers do no more than define the objective scope of the exclusion of certain public service contracts, without establishing any equivalence between voluntary associations and social cooperatives in connection with the contracts referred to in Articles 56 and 57 of Legislative Decree No 117/2017.

In that context, the awarding of the service contracts to voluntary organisations is not the only, or mandatory, option for public authorities, but merely one preferred option (*‘may ... on a preferential basis’*). The legislature expressed its preference for bodies whose activities are based on the voluntary, spontaneous and free provision of services by their members, and which adhere to the principle of solidarity. Social cooperatives, by contrast, are based on a form of work which is undertaken in common and is aimed at procuring an economic advantage for those who are part of the cooperative. Consequently, only voluntary organisations derive no profit from their work and fulfil the condition, alluded to in the Court’s judgments in Cases C-113/13 and C-50/14, of not pursuing, even indirectly, any economic advantage for their members.

### **Succinct presentation of the grounds for the request for a preliminary ruling**

- 8 The Consiglio di Stato (Council of State) makes the preliminary observation that, in reality, neither of the judgments to which the respondent refers specifically addresses the point that social cooperatives are not mentioned among the entities to which a contract for the provision of emergency ambulance transport may be awarded directly. Both of the judgments mentioned predate the entry into force of Legislative Decree No 117/2017, and they therefore relate to domestic legislation other than Article 57 of the decree, which is the provision on which the contested decisions in the procedure were based. Equally, the directive which those judgments applied (Directive 2004/18/EC of the European Parliament and of the Council) is not the same as that which is alleged to be infringed in the present case.

- 9 The Consiglio di Stato (Council of State) emphasises, on the other hand, the relevance to the resolution of the dispute of the more recent judgment in *Falck Rettungsdienste* (Case C-465/17), according to which the decisive factor, for the purposes of Article 10(h) of Directive 2014/24, is not having a profit-making purpose and the reinvestment of any profits. However, the absence of any profit motive applies without question to the applicant cooperative, as is expressly stated in Article 6 of its articles of association, and the provision made for dividends in Article 5 thereof is no more than an indirect citation of Article 2514 of the Civil Code.
- 10 Admittedly, social cooperatives are different, in organisational and functional terms, from voluntary associations, because, while neither of them has any profit motive, it is only the former that generate an economic advantage for their members, whereas the latter are characterised by the ‘civic objectives or objective of solidarity or social utility’ of the activities of general interest which they carry on (Article 5 of Legislative Decree No 117/2017).
- 11 Nevertheless, first of all, Article 10(h) – like recital 28 – of Directive 2014/24 refers simply to ‘non-profit organisations or associations’, with no restriction of its scope to voluntary associations (the literal argument) and, secondly, under EU law, the concept of undertaking (and, along with it, participation in public calls for tenders) does not presuppose the coexistence of the undertaking’s profit-making purpose (the logical and systematic argument).
- 12 Therefore, the restriction of the possibility of entrusting the provision of an emergency ambulance transport service ‘on a preferential basis’ and by way of direct contracting solely to one of the many types of ‘non-profit organisations or associations’ contemplated by Directive 2014/24, to the exclusion of social enterprises, suggests that the rules laid down in Article 57 of Legislative Decree No 117/2017 might not be in conformity with EU law. That restriction means in fact that – despite the broad way in which the derogation introduced by recital 28 and Article 10(h) of the directive is framed – voluntary associations are required to participate in a public tendering procedure only when, for one reason or another, direct contracting ‘on a preferential basis’ is not possible, whereas all other non-profit organisations must always go through a public tendering procedure in order to be awarded a contract to provide the same service. This difficulty is not overcome by the fact that, under national law, entrusting the service by direct contracting is merely optional, because social cooperatives are, in any event, not organisations to which a contract may be awarded.
- 13 Moreover, the Court has recently pointed out, in its judgment in Case C-367/19, that the concept of ‘public contract’, as a ‘contract for pecuniary interest’, also encompasses contracts under which the only payment provided for is the reimbursement of the expenditure incurred. Accordingly, the characteristic which the TAR (Regional Administrative Court) and the defendant emphasised – namely that it is only within voluntary associations that the members obtain no economic advantage at all, other than the reimbursement of expenditure – fails to provide

any justification under EU law for the more favourable treatment of voluntary associations by comparison with social cooperatives.

- 14 One further element that might cloud any distinction between the two types of non-profit entity is that, while voluntary associations may have employees, in so far as is necessary for them to operate, social cooperatives may have voluntary members, who provide their services free of charge and are merely reimbursed their expenses (Article 2 of Law No 381/1991).
- 15 In light of all the above, the Consiglio di Stato (Council of State) questions the compatibility of the exclusion effected by the national legislation at issue with EU law, stays the proceedings and refers to the Court the request for a preliminary ruling set out above.

WORKING DOCUMENT