

Case C-545/21**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:**

31 August 2021

Referring court:

Tribunale Amministrativo Regionale per il Lazio (Italy)

Date of the decision to refer:

4 August 2021

Applicant:

Azienda Nazionale Autonoma Strade SpA (ANAS)

Defendant:

Ministero delle Infrastrutture e dei Trasporti

Subject matter of the main proceedings

Action brought by Azienda Nazionale Autonoma Strade SpA ('ANAS') seeking the annulment of the recovery order issued by the Ministero delle infrastrutture e dei trasporti (Italian Ministry of Infrastructure and Transport; 'the Ministry') requiring ANAS to repay funds that it received unduly, and other measures not directly related to the questions referred for a preliminary ruling.

Subject matter and legal basis of the request

Article 267 TFEU; interpretation of Regulations (EC) No 1083/2006, (EC) No 1828/2006 and (EC, Euratom) No 2988/95, the Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests (Council Act of 26 July 1995 drawing up the Convention on the protection of the European Communities' financial interests (95/C 316/03)) and Directive (EU) 2017/1371, to establish whether the concepts of 'irregularity' and 'fraud' include conduct which is likely, in the abstract, to favour one of the participants in a tendering procedure, even in the

absence of complete proof of the conduct and of the effects of such conduct on the selection of the successful bidder (question 1); compatibility of Article 38(1)(f) of decreto legislativo n. 163/2006 (Legislative Decree No 163/2006) with Article 45(2)(d) of Directive 2004/18/EC (question 2); interpretation of the abovementioned EU legislation in relation to the recovery of aid disbursed by the Member State, where it was used in accordance with its intended purpose for a project eligible for EU funding and actually implemented (questions 3 and 4).

Questions referred for a preliminary ruling

1. Must Article 70(1)(b) of Council Regulation (EC) No 1083/2006, Article 27(c) of Commission Regulation (EC) No 1828/2006, Article 1 of the PFI Convention referred to in the Council Act of 26 July 1995, Article 1(2) of Council Regulation (EC, Euratom) No 2988/95 and Article (3)(2)(b) of Directive (EU) 2017/1371 be interpreted as meaning that conduct which is likely, in the abstract, to favour an economic operator during a contract award procedure is always categorised as an ‘irregularity’ or as ‘fraud’, thus constituting a legal basis for the recovery of the aid, even when there is no complete proof that such conduct has actually taken place, or there is no complete proof that it was decisive in the selection of the beneficiary?
2. Does Article 45(2)(d) of Directive 2004/18/EC preclude a legal provision such as Article 38(1)(f) of Legislative Decree No 163/2006, which does not allow the exclusion from a tender of an economic operator who has attempted to influence the decision-making process of the contracting authority, particularly when the attempt consisted of bribing certain members of the tender evaluation committee?
3. If the answer to one or both of the above questions is in the affirmative, must the rules referred to always be interpreted as requiring the Member State to recover the aid and the Commission to make a 100% financial correction, despite the fact that the aid was used for its intended purpose, for a project eligible for EU funding and which was actually implemented?
4. If the answer to question 3 is negative, or that no recovery of the aid or 100% financial correction is necessary, do the provisions referred to in question 1, and compliance with the principle of proportionality, make it possible to establish the recovery of the aid and the financial correction taking into account the financial damage actually caused to the general budget of the European Union? More specifically, in a situation such as the one at issue in these proceedings, can the ‘financial implications’, within the meaning of Article 98(3) of Regulation (EC) No 1083/2006, be established on a flat-rate basis, by applying the criteria set out in the table under paragraph 2 of Commission Decision No 9527 of 19 December 2013?

Provisions of European Union law relied on

Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests, in particular Article 1;

Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities' financial interests, in particular Article 1(2);

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, in particular Article 45(2)(d);

Council Regulation (EC) No 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999, in particular Article 70(1)(b);

Commission Regulation (EC) No 1828/2006 of 8 December 2006 setting out rules for the implementation of Council Regulation (EC) No 1083/2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and of Regulation (EC) No 1080/2006 of the European Parliament and of the Council on the European Regional Development Fund, in particular Article 27(c);

Commission document COCOF 07/0037/03-EN of 29 November 2007, which sets out guidelines for determining financial corrections to be made to expenditure co-financed by the Structural Funds or the Cohesion Fund for non-compliance with the rules on public procurement;

Commission Decision C(2013) 9527 final 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;

Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law, in particular Article 3(2)(b).

Provisions of national law and case-law relied on

Decreto legislativo 12 aprile 2006, n. 163, Codice dei contratti pubblici relativi a lavori, servizi e forniture in attuazione delle direttive 2004/17/CE e 2004/18/CE (Legislative Decree No 163 of 12 April 2006 establishing the Code on public works contracts, public service contracts and public supply contracts pursuant to Directives 2004/17/EC and 2004/18/EC), repealed following the entry into force

of decreto legislativo 18 aprile 2016, n. 50 (Codice dei contratti pubblici) (Legislative Decree No 50 of 18 April 2016 (Public Procurement Code)), and applicable to the tendering procedure in question as it was published in 2012, in particular: Article 38(1), in the version in force at the material time, which provided as follows:

‘1. The following persons shall be excluded from participation in procedures for the award of concessions and public works contracts, public service contracts and public supply contracts, and shall be prohibited from taking part as subcontractors or from concluding any related contract:

...

(c) any person who has been the subject of a conviction that has the force of *res judicata* or a criminal order against which no appeal lies, or who has been the subject of a judgment implementing a sentence resulting from a negotiated plea, as provided for in Article 444 of the Code of Criminal Procedure, in respect of the commission of grave professional conduct offences to the detriment of the State or the Community; the following constitute, in any event, grounds for exclusion: a conviction set out in a judgment which has the force of *res judicata* for one or more offences relating to participation in a criminal organisation, corruption, fraud or money laundering, as defined by the Community measures cited in Article 45(1) of Directive 2004/18;

...

(f) any person who, in the reasoned assessment of the contracting authority, has been guilty of serious negligence or bad faith in the performance of any contract awarded to that person by the contracting authority which published the contract notice; or any person who has been found guilty of grave professional misconduct on the basis of any evidence which the contracting authority may establish.’

Legge 29 settembre 2000, n. 300 (Law No 300 of 29 September 2000) ratifying and implementing the following international instruments drawn up on the basis of Article K.3 of the Treaty on European Union: Convention on the protection of the European Communities’ financial interests, done at Brussels on 26 July 1995 [and other international instruments on the prevention of corruption].

The Italian courts have held that the mere existence of criminal proceedings against the representatives of an undertaking participating in a tender does not constitute ‘grave professional misconduct’ liable to result in exclusion from the tender pursuant to Article 38(1)(f) of Legislative Decree No 163/2006.

Succinct presentation of the facts and procedure in the main proceedings

- 1 By Decision C(2007) 6318 of 7 December 2007, the European Commission ratified the National Operational Programme ‘Networks and Mobility’ for the

period 2007-2013 ('the NOP'). ANAS was granted funding under that programme for the costs of roadworks carried out on the Strada Statale 96 ('the SS 96'). The total amount of funding came to EUR 29 995 508.22, of which the EU contribution was EUR 22 496 631.17 (European Regional Development Fund (ERDF)) and the national contribution was EUR 7 498 877.06. The Italian Ministry of Infrastructure and Transport is the Managing Authority for this funding, which has already been partially paid to ANAS.

- 2 To carry out the works on the SS 96, in 2012 ANAS published an invitation to tender for a contract which was awarded in the same year to a temporary association of undertakings involving the company Aleandri SpA ('the Aleandri Consortium').
- 3 By the decision contested by this action ('the contested decision'), the Italian Ministry of Infrastructure and Transport decided not to pay ANAS the remainder of the funding for the SS 96 and to proceed with the recovery of 100% of the amount already paid to that company, on the grounds that the award of the contract was vitiated by irregularities of a fraudulent nature within the meaning of, inter alia, Article 2(7) of Regulation (EC) No 1083/2006 and Articles 4 and 5 of Regulation (EC, Euratom) No 2988/95. Those irregularities were uncovered during criminal investigations, resulting in three ANAS officials being charged with corruption for having accepted money from Aleandri SpA to unlawfully influence the tender in question. Subsequently, two of the officials secured a negotiated sentence, handed down by the judge in charge of preliminary investigations at the Tribunale di Roma (District Court, Rome, Italy) in a ruling on 28 November 2018. Those events are currently the subject of criminal proceedings, initiated against the legal representative of Aleandri SpA and against Aleandri SpA itself, charged with an administrative offence since it failed to have the appropriate organisational and management models in place to prevent such offences. In particular, the criminal investigations revealed that one of the ANAS officials charged had asked his colleagues on the tender evaluation committee to recommend the Aleandri Consortium. However, it had not been proven that those committee members had actually influenced the award or that other economic operators would have won the contract had the corruption offences not taken place.
- 4 ANAS challenged the Ministry's decision, seeking the annulment of same before the TAR del Lazio (Regional Administrative Court, Lazio, Italy), the referring court.
- 5 The Ministry appeared in court seeking the dismissal of the action.

The essential arguments of the parties in the main proceedings

- 6 By its first plea in law, ANAS alleges the infringement and misapplication of Article 1(2) of Regulation (EC) No 2988/95, Article 1 of the PFI Convention of 1995 and Article 27(c) of Regulation (EC) No 1828/2006, and misuse of powers

for failure to state reasons and failure to carry out a proper inquiry. In that respect, the applicant claims that:

- (a) in the first place, the applicant has not been convicted as such and there is no evidence that the Aleandri Consortium was wrongfully awarded the contract in question. As no undue expenditure has been made from the general budget of the EU, no damage has occurred;
 - (b) in the second place, fraud cannot be established in the present case because neither Article 1 of the PFI Convention nor Regulation (EC) No 2988/95 specify the conditions necessary to establish that an irregularity or fraud exists. Indeed, it was Directive (EU) 2017/1371 that first categorised fraud committed in relation to expenditure for public contracts as ‘fraud affecting the Union’s ... interests’;
 - (c) in the third place, in the contested decision, the Ministry incorrectly relied on Commission Decision C(2013) 9527, whereas the guidelines contained in the Commission document COCOF 07/0037/03-EN were applicable in the present case. In addition, the defendant applied the 100% financial correction automatically, without carrying out a specific assessment of the case.
- 7 By its second plea, ANAS submits that the Ministry based the contested measure on a ‘sentence negotiated between the parties’, which does not amount to a conviction and cannot be used in civil proceedings or administrative procedures.
- 8 By its third plea, ANAS alleges the infringement of Article 2(1)(7) of Regulation (EC) No 1083/2006, Article 98(2) of Regulation (EC) No 1083/2006 and Article 135 of Regulation (EU, Euratom) No 966/2012, as well as the infringement of the principle of proportionality and misuse of powers for failure to carry out a proper inquiry, in so far as the contested decision does not indicate any damage for the EU budget resulting from the events in question. In particular, the infrastructure involved in the works financed has been completed and is usable, and the regularity of the works carried out has not been contested. Furthermore, the EU funds were used for their intended purpose, and there is no evidence of undue expenditure being charged to the general budget of the EU. The applicant submits that, given the circumstances of the case, the Ministry at least could have applied a lower percentage than the financial correction contained in the contested measure, in accordance with the Commission’s guidelines on financial corrections.

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

- 9 In the view of the referring court, the evidence at its disposal does not allow it to say with certainty that the contract in question was unlawfully awarded to the Aleandri Consortium; conversely, it has been partially proven that Aleandri SpA acted with a view to influencing the outcome of the tendering procedure.

Nevertheless, the court points out that the tender in question, having been published in 2012, is governed by Legislative Decree No 163/2006, currently repealed, which did not expressly provide for the exclusion of an economic operator who attempts to influence the decisions of the contracting authority, whereas that exclusion is explicitly provided for in Article 57(4)(i) of the current Directive 2014/24/EU. Consequently, the award cannot be deemed unlawful on the basis of the conduct of the legal representative of Aleandri SpA.

- 10 According to the referring court, the Court of Justice must clarify whether, in a case such as the one at issue in the present action, an ‘irregularity’ in the form of ‘fraud’ may be held to exist within the meaning of Regulation (EC) No 2006/1083 and, if so, whether the 100% financial correction may be applied. The referring court finds that there was no damage to the general budget of the European Union in the present case, because the funding was used for its intended purpose. Indeed, the project in question was included in the 2007-2013 NOP, was eligible for funding from the EU budget without objection and was duly completed. According to the referring court, there is insufficient evidence to establish interference in the tendering procedure, first because the sentence negotiated between the parties and handed down to the ANAS officials does not determine the liability of the legal representative of Aleandri SpA, and second because the legal representative is still the subject of criminal proceedings for those events and might even be acquitted. In the opinion of the referring court, even if there were sufficient evidence to establish that the legal representative of Aleandri SpA had bribed certain ANAS officials in order to be awarded the contract, it would have been impossible to exclude the economic operator who had attempted to influence the outcome of the tender, given that Article 38 of Legislative Decree No 163/2006, applicable to the tendering procedure in question, did not provide for such exclusion.
- 11 The referring court has doubts as to the consistency of the national legislation applicable in the present case with Directive 2004/18/EC, which was in force at the material time, if Article 45(2)(d) of that directive is interpreted as meaning that the concept of ‘grave professional misconduct’ implicitly includes conduct intended to influence the award. However, the same court doubts that this is the correct interpretation, since Article 57(4)(i) of Directive 2014/24/EU explicitly mentioned in the grounds for exclusion of competitors conduct aimed at influencing tendering procedures. Moreover, that express provision of Article 57(4)(i) might simply confirm a principle that was already implicit in procurement law when Directive 2004/18/EC was still in force.
- 12 The referring court also takes the view that damage to the budget of the European Union has not been established, which might have occurred had the tender submitted by the successful economic operator (the Aleandri Consortium) not represented the best value for money.
- 13 According to the same court, the concepts of ‘irregularity’ and ‘fraud’ which can be inferred from the provisions of EU law presuppose that the existence of

damage to the EU budget has been proven, at least potentially, consisting of the allocation of undue expenditure to that budget, or the use of funding for purposes other than those for which it was granted. In that respect, the referring court refers to Commission Decision No 9527 of 19 December 2013, which provides for the possibility of applying a 100% financial correction in cases of irregularities committed in favour of certain participants in the tendering procedure: the referring court holds that the decision includes among those irregularities cases where EU funding was used for its intended purpose, but was allocated to a person who was not eligible to receive it, for example because that person did not meet the contract award criteria.

14 The referring court has doubts as to whether the concept of irregularity contained in Commission Decision No 9527 of 19 December 2013 is entirely consistent with EU law for the following reasons:

- (a) In the first place, the provisions referred to do not expressly mention cases where the funds are allocated to a party who is not eligible to receive them.
- (b) In the second place, the referring court assumes that irregularities, including fraud, presuppose the payment of expenditure from the general budget of the EU which would not have been made had those irregularities not been committed; if that assumption proved to be correct, the 100% financial correction applied to an eligible and duly completed project would be unjustified.
- (c) In the third place, Articles 98 and 99 of Regulation (EC) No 1083/2006 provide that the Commission, when determining the extent of financial corrections, must take into account the nature and gravity of the irregularities as well as other factors, while Regulation (EC) No 1303/2013 provides that corrections must be applied in accordance with the principle of proportionality. The referring court questions whether the principle whereby the financial correction is intended to remedy actual damage can be inferred from the abovementioned provisions, such that, in cases of irregularities consisting of unduly favouring an economic operator, the amount of funding to be repaid should correspond to the damage actually caused to the European Union. That principle is also reflected in the abovementioned Decision No 9527 of 19 December 2013, which provides for a maximum correction of 25% in the event of non-compliance with the award criteria set out in the contract notice.
- (d) In the fourth place, Decision No 9527 of 19 December 2013, in so far as it allows a 100% correction rate to be applied in cases of conduct intended to favour an economic operator, even in the absence of proof of the actual existence of such conduct and the actual advantage conferred on the economic operator, implies that the decision to recover the funding has a punitive function, which is, however, contrary to Regulation (EC)

No 2988/1995, which makes a clear distinction between the recovery of funding and the penalties to be imposed on fraudsters.

- 15 The referring court maintains that the questions referred are relevant to the decision, since they serve to establish whether the concepts of irregularity and fraud also extend to situations in which there is no complete proof of the conduct that led to the allocation of the aid to a person who was not eligible to receive it (question 1). Furthermore, for the purposes of the decision, it is necessary to clarify whether the conduct of the legal representative of Aleandri SpA, who is accused of having bribed certain ANAS officials, is in itself capable of rendering unlawful the award of the contract in question (question 2). Questions 1 and 2 relate to the arguments raised by ANAS, which contests that the contract was unlawfully awarded to the Aleandri Consortium. Question 3 seeks to establish whether damage to the EU budget can be considered to exist in relation to an eligible project which was included in the NOP and duly completed, and – if such damage is deemed to exist – whether recovery of 100% of the funding is necessary. If question 3 is answered in the negative, this would mean that the action brought by ANAS would be upheld. Question 4 concerns the argument put forward by ANAS that the Ministry could and should apply a correction rate of less than 100% to the recovery of the funding. If question 4 is answered in the affirmative, this would also mean that the action brought by ANAS would be upheld.