

Case C-403/23**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:**

30 June 2023

Referring court:

Consiglio di Stato (Italy)

Date of the decision to refer:

16 June 2023

Appellant:

Luxone Srl, in its own name and as agent of the RTI to be established with Iren Smart Solutions SpA

Respondent:

Consip SpA

Subject matter of the main proceedings

Appeal brought before the Consiglio di Stato (Council of State, Italy) by the company Luxone ('the appellant'), in its own name and as agent of the temporary joint venture ('the RTI') to be established with the company Iren Smart Solutions, against the judgment of the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio, Italy) ('the TAR Lazio') by which that court dismissed the appellant's appeal against the measures adopted by Consip s.p.a. against the RTI. Those measures provided for the exclusion from a tendering procedure and the collection of the provisional securities which the appellant had submitted under the tendering procedure.

Subject matter and legal basis of the request

The reference for a preliminary ruling, ordered by the Council of State as a court of last instance, pursuant to Article 267 TFEU, seeks to ascertain whether the Italian legislation on changing the composition of the RTI, excluding the RTI

from the tendering procedure in the event that one of its members withdraws and collecting provisional securities submitted under a tendering procedure from which the tenderer was excluded, is compatible with Directive 2004/18/EC and with the EU principles of proportionality, freedom to conduct a business, freedom of movement and freedom of establishment.

Questions referred for a preliminary ruling

(1) Do Directive 2004/18/EC, Articles 16 and 52 of the Charter of Fundamental Rights of the European Union and the principles of proportionality, competition, freedom of establishment and freedom to provide services laid down in Articles 49, 50, 54 and 56 of the TFEU preclude national rules (Articles 11(6), 37(8), (9), (10), (18) and (19), and 38(1)(f) of Legislative Decree No 163 of 2006) which exclude, in the event of the expiry of the validity period of the tender originally submitted by an RTI to be established, the possibility of reducing the original membership of the RTI when the validity period of that tender is extended? In particular, are those national provisions compatible with the general principles of EU law of freedom of economic initiative and effectiveness, and with Article 16 of the Charter of Fundamental Rights of the European Union?

(2) Do Directive 2004/18/EC, Articles 16, 49, 50 and 52 of the Charter of Fundamental Rights of the European Union, Article 4 of Protocol No. 7 to the European Convention on Human Rights (ECHR), Article 6 TEU, and the principles of proportionality, competition, freedom of establishment and freedom to provide services laid down in Articles 49, 50, 54 and 56 TFEU preclude national rules (Articles 38(1)(f), 48 and 75 of Legislative Decree No 163 of 2006) which provide for the application of the penalty of forfeiture of the provisional security, as an automatic consequence of the exclusion of an economic operator from a procedure for the award of a public service contract, irrespective of whether or not that economic operator has been awarded the contract?

Provisions of European Union law relied on

Directive 2004/18/EC, Recital 2, Article 2 and Article 4(2) in particular

Articles 16, 49, 50 and 52 of the Charter of Fundamental Rights of the European Union ('the Charter of Nice')

Articles 49, 50, 54 and 56 TFEU

Article 6 TEU

Provisions of national law relied on

Decreto legislativo n. 163 del 2006, 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 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) ('the Contract Code'), in the version applicable at the time of the facts:

Article 11(6):

'No tenderer may submit more than one tender. The tender shall be binding for the period indicated in the notice or invitation to tender or, failing that, for 180 days from the expiry of the submission deadline. The contracting authority may ask tenderers to extend this period.'

Article 37(8), (9), (10), (18) and (19):

'8. The persons referred to in Article 34(1)(d) and (e) may submit tenders, even if they have not yet been established. In that case, the tender must be signed by all of the economic operators who will form the temporary joint venture or ordinary consortium of tenderers and must contain an undertaking that, if the contract is awarded, the same operators will grant a special collective mandate to represent them to one of the tenderers (...) which will enter into the contract in its own name and on its own behalf and on behalf of the principals.

9. (...) Without prejudice to paragraphs 18 and 19, it shall be prohibited to make any change to the composition of temporary joint ventures and ordinary consortia of tenderers in relation to the composition submitted in the tender.

10. Failure to comply with the prohibitions in the preceding paragraph shall entail the annulment of the award or the nullity of the contract and the exclusion of the joint tenderers (...).

18. In the event of the bankruptcy of the agent or, in the case of an individual contractor, in the event of death, prohibition, disqualification or bankruptcy, or in the cases provided for by the anti-mafia regulations, the contracting authority may continue the procurement relationship with another economic operator that has been appointed as agent in accordance with the procedure laid down in this Code, provided that it fulfils the qualification requirements for supplying the outstanding works or services or supplies; if these conditions are not met, the contracting authority may withdraw from the contract.

19. In the event of the bankruptcy of one of the principals or, in the case of an individual contractor, in the event of death, prohibition, disqualification or bankruptcy, or in the cases provided for by the anti-mafia regulations, the agent shall, if he or she does not identify another economic operator that fulfils the suitability requirements to take over, be required to perform the contract, directly or through the other principals, provided that the other principals fulfil the qualification requirements for supplying the outstanding works or services or supplies.'

Article 38(1)(f):

‘1. ‘The following persons shall be excluded from participation in procedures for the award of concessions and public works contracts, supply contracts and service contracts, and may not be awarded subcontracts, or conclude any related contract: (...) (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 proven by any means which the contracting authority can demonstrate’.

Article 48(1):

‘Before opening the tenders submitted, the contracting authorities shall ask a number of tenderers not less than 10% of the tenders submitted, rounded up to the next unit, chosen by drawing of lots, to provide proof, within ten days of the date of that request, that they meet the conditions as to economic and financial standing and technical and organisational capacity, which may be required in the contract notice, by submitting the documentation indicated in that notice or in the letter of invitation. The contracting authorities shall verify, during the check, that they satisfy the qualification requirement for the execution of works (...). Where such proof is not provided, or where it does not confirm the statements contained in the request to participate or in the tender, the contracting authorities shall exclude the tenderer from the tendering procedure [and] enforce the relevant provisional security (...).’

Article 75:

‘1. The tender shall be accompanied by a guarantee, equal to two per cent of the basic price specified in the notice or invitation to tender, in the form of a security or bond, chosen by the tenderer. (...)

6. The guarantee shall cover the failure to sign the contract owing to the contractor, and shall be automatically released upon signing the contract. (...)

9. The contracting authority shall, in the notification of the award to the unsuccessful tenderers, at the same time, in relation to them, provide for the release of the guarantee referred to in paragraph 1 (...).’

Succinct presentation of the facts and procedure in the main proceedings

(a) Background to the dispute

- 1 By a notice published on 21 December 2015, Consip organised a tendering procedure, divided into 12 lots, for the award of the public lighting service and related services. Luxone, Consorzio Stabile Energie Locali (‘CSEL’), Iren Smart

Solutions and Gi One came together to jointly submit a tender for Lots 1, 8, 10 and 11 and provided the respective provisional securities, as an RTI to be established, and undertook to establish an RTI if they were awarded the tender.

- 2 The tender procedure should have ended by 18 April 2017, but was extended by Consip on eight occasions. With regard to those four companies that took part in the tendering procedure, this led to the need, upon the expiry of the period during which the tender was binding, to bring into conformity, on several occasions, the tenders that had initially been submitted and to extend the provisional securities.
- 3 In 2020, on the occasion of the seventh and eighth confirmation requests by Consip, Luxone and Iren Smart Solutions expressed their willingness to confirm their initial tenders. Gi One and CSEL, however, expressed a desire not to confirm the tenders, on account of the unexpected, multi-year length of the procedure. More specifically, those two companies stated that the tenders were no longer viable from a commercial point of view and in terms of proper and prudent business management.
- 4 According to Consip, by not confirming the tenders, Gi One and CSEL withdrew from the RTI, thereby changing the initial composition thereof, constituting withdrawal from the RTI. In October 2020, Consip therefore adopted, with regard to the RTI as a whole, a measure excluding it from the tendering procedure and a measure involving collecting the provisional securities, totalling EUR 2 950 000.00. The measure excluding it from the tendering procedure was based on the unlawfulness and evasive nature of the withdrawal of Gi One and CSEL.
- 5 As regards the unlawfulness of the withdrawal, according to Consip, it is true that Italian legislation provides that the tenderer and, therefore, in the present case, the RTI as a whole, has the right to withdraw from the tender when a certain period of time has elapsed since the invitation to tender was issued, but that right cannot be exercised by only some of the companies in the RTI.
- 6 As regards the evasive nature of the withdrawal, according to Consip, the purpose of Gi One's withdrawal was to circumvent the checks provided for by law, since some of the persons linked to Gi One had engaged in criminal conduct. As regards the withdrawal of CSEL, the evasiveness stemmed in particular from the absence of the conditions required for participation in the tendering procedure, which must, in fact, be fulfilled from the time that the request to participate is submitted until the tender is awarded.

(b) Proceedings at first instance and on appeal

- 7 The appellant brought an action before the TAR Lazio against the abovementioned measures adopted by Consip.

- 8 By judgment No 4505/2021, the TAR Lazio dismissed that action, relying on: (a) the impossibility of the tender being confirmed, on the expiry date, only by certain members of the RTI; (b) the inadmissibility of the exercise of an RTI's right of withdrawal outside the situations permitted by the case-law, which do not exist in the present case; (c) the evasive nature of the withdrawal in the present case, in so far as it seeks to avoid a measure excluding it from the tendering procedure.
- 9 The TAR Lazio also found that the conditions for raising a question of constitutionality or the compatibility of Italian legislation with EU law were not met. In its view, Directive 2004/18, which was in force at the material time, does not require the national legislature to introduce, in a situation such as that in the present case, the possibility of reducing the number of undertakings forming part of the original RTI.
- 10 The appellant brought an appeal against the judgment of the TAR Lazio before the Council of State, which then stayed the proceedings pending the decision of the Corte costituzionale (Constitutional Court) on questions of constitutionality raised by the Council of State in other proceedings concerning a similar dispute.
- 11 By judgment No 198 of 2022, the Constitutional Court held that collection of the provisional security was not a penalty that was punitive in nature as it essentially seeks to ensure compliance with the tendering procedure rules by restoring the public interest harmed, that is, to avoid the participation in the tendering procedure of unsuitable tenderers or tenders which do not meet the necessary conditions. According to the Constitutional Court, it can be inferred from the low amount of the provisional guarantee, the provision of alternative forms of guarantee (the security or bond) and the system of reductions laid down by the legislature that there is no particular degree of seriousness, which is necessary for the adverse measure to be treated as, in essence, a criminal penalty.
- 12 The Council of State takes the view that the judgment of the Constitutional Court is not decisive for resolving the dispute before it, having regard also to the fact that, in the case before it, the total amount of the securities is in fact very high.

The essential arguments of the parties in the main proceedings

- 13 The appellant disputes the lawfulness of the measure to collect the provisional securities following its exclusion from the tendering procedure. That measure is unlawful, indirectly, since the exclusion measure on which the collection measure is based is unlawful. It is also unlawful in its own right, since, under the legislation in force at the material time, collection can only take place if two conditions are met: in the event that the tenderer does not prove that it meets the economic-financial and technical-organisational capacity requirements or in the event of failure to sign the contract 'owing to the contractor'.
- 14 In both cases, according to the appellant, the collection of the security presupposes the existence of conduct subjectively attributable to the economic operator who is

responsible for not signing the contract or for continuing to participate in the tendering procedure. The appellant claims that neither of those two situations exists in the present case.

- 15 According to the appellant, the collection of securities constitutes a highly punitive measure of a criminal nature in so far as the typical objective of collecting the security, namely to make good the damage caused to the contracting authority, is not present. In the present case, Consip has not suffered any damage since the RTI was excluded from the tendering procedure.
- 16 The automatic collection of the securities, for a substantial and onerous amount, is a wholly unreasoned and unreasonable penalty manifestly disproportionate to the RTI's conduct and gives rise to an interpretation of Articles 48 and 75 of the Contract Code that is contrary to constitutional and EU principles and provisions.

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

- 17 According to the Council of State (also, 'the referring court'), it is necessary to assess the compatibility with EU law of the Italian legislation which leads to equating the failure of an economic operator to confirm the tender, upon the expiry of the period during which it is binding, with withdrawal from the RTI. Attention should also be drawn to the exclusion measure, which is also relevant in relation to the consequential measure to collect the security.

On the exclusion measure

- 18 According to the referring court, under Italian legislation, the exclusion measure is an act required by law, first, because Gi One's failure to confirm the tender, that is to say, its withdrawal, infringes the prohibition on changing the RTI and, second, because the withdrawal constitutes, in the present case, an act circumventing the check on the moral reliability of the economic operator.
- 19 As regards the prohibition on changing the RTI, the referring court points out that, under Article 37 of the Contract Code, the right to withdraw from the tender submitted in the tendering procedure, once it has expired, can be exercised by the RTI to be established only in its entirety, given that none of the exceptions permitted by the legislation and case-law which allow the RTI to be changed exist in the present case.
- 20 The RTI takes part in the tendering procedure as a joint venture composed of all the economic operators who will constitute it in the event of it being awarded the tender. It is therefore not possible for only two members of the RTI (as compared to the four original members) to confirm the tender, having regard, in particular, to the purpose of Article 11(6) of the Contract Code and the principle that the RTI cannot be changed in the course of a tendering procedure, which follows from Article 37(9) of that Code and which also applies where the RTI has not yet been formally established.

- 21 The purpose of Article 11(6) is to keep the tender unchanged for the entirety of the likely duration of the tendering procedure. That article is intended to protect a tenderer that, once the tendering period has ended, can withdraw from the tender, whereas, if it does not state that it has withdrawn, the tender does not expire. Therefore, in the absence of any indication to the contrary by all of the parties comprising the joint venture, the obligation must be considered to still exist. The provisions of Italian legislation also make it possible for the RTI, which has not yet been formally established, to offer the contracting authority a guarantee of the seriousness of its participation in the tendering procedure so as to ensure that the RTI is indeed established once the tender has been awarded.
- 22 As regards the circumvention of the reliability check, the referring court points out that, in accordance with the relevant administrative case-law, the withdrawal of one of the undertakings is not permitted if it is intended to circumvent the legislation and, in particular, where it is intended to avoid checks on whether the conditions for participation have been met, thereby evading the penalty of exclusion from the tendering procedure for failure to comply with those conditions.
- 23 In the light of those considerations, the referring court observes that the Italian legislation, as interpreted by the case-law, requires the members of the RTI to remain bound to the submitted tender for an indefinite period even in the event that its binding nature has multiple expiry dates, in the case of long, complex tendering procedures, with the only possibility for not confirming the tender being if all the original members of the RTI do not confirm the tender. According to the referring court, it is doubtful whether that legislation is compatible with the principle of freedom to conduct a business enshrined in Article 16 of the Charter of Nice, which codifies the case-law of the Court of Justice and is based on Article 119 TFEU, and with the principle of proportionality laid down in Article 52 of the Charter of Nice and with the principles of proportionality, competition, freedom of establishment and freedom to provide services contained in the TFEU.
- 24 The prohibition on each of the individual members of the RTI withdrawing from the tender, in particular as regards tendering procedures that last for a significant period of time, if the RTI is not to be excluded as a whole, does not appear, for the referring court, to be proportionate to the requirement to guarantee the seriousness of the submitted tender, since the economic operators that confirmed the tender are themselves in possession – even in the absence of the operator that has withdrawn from the tender – of all the conditions for participation.
- 25 In accordance with the principle of proportionality, which is a general principle of EU law and with which the award of contracts entered into in the Member States must comply, as is clear from Directive 2004/18, the measures adopted by the Member States must not go beyond what is necessary to achieve that objective, as is also confirmed by the case-law of the Court of Justice.

- 26 Finally, the referring court notes that, once the failure to confirm the tender by each economic operator constituting the RTI is treated in the same way as withdrawal from the RTI, exclusion becomes, in any event, mandatory by law if it is regarded as circumventing the check on the moral reliability of the operator which has withdrawn; on the other hand, if that operator's failure to confirm the tender is permitted, no subsequent check should be carried out on its professional reliability, since that operator can no longer be regarded as forming part of the RTI participating in the tendering procedure.

On the measure to collect the security

- 27 The Council of State points out that the European Court of Human Rights ('the ECtHR') has ruled on the nature, extent and fairness of financial penalties for the purposes of including them in a so-called criminal matter (judgment of 4 March 2014, *Grande Stevens and others v Italy*, paragraph 99; see also to that effect, judgment of the Court of Justice of the European Union of 5 June 2012, C-489/10).
- 28 The Council of State, in the context of its case-law, has pointed out that the ECtHR has developed its own, autonomous criteria for establishing whether or not an offence and the related penalty are criminal in nature. In particular, the following three criteria have been identified: (i) the legal classification of the offence under national law, it being understood that it is not binding when it is established that the measure is 'intrinsically criminal' in nature; (ii) the nature of the offence, inferred from the scope of the rule which provides for it and from the objective pursued; (iii) the degree of severity of the penalty.
- 29 According to the referring court, given the extent of the assets yielded that were required from the appellant, the collection of the provisional securities acquires the appearance of a penalty which must be recognised as being criminal in nature, in accordance with the case-law of the ECtHR. The automatic call on the provisional guarantees, in the present case, would in fact constitute a clear infringement of the principle of the proportionality of penalties.
- 30 First of all, Article 49(3) of the Charter of Nice, according to which 'the severity of penalties must not be disproportionate to the criminal offence', is significant.
- 31 In the present case, there is a clear failure to strike a fair balance between the public interest and the fundamental rights guaranteed at European level. Indeed, the appellant was the addressee of a very significant financial penalty, by virtue of an automatic mechanism which, as such, is by definition not proportionate and without any proper assessment of the circumstances of the case.
- 32 Article 1, Protocol 1, to the ECHR, like Article 17 of the Charter of Nice, has been interpreted as being aimed at ensuring compliance with the proportionality between the conduct engaged in and the penalty imposed.

- 33 It is then clear that Articles 38(1)(f) and 48 of the Contract Code are contrary to the constitutional and European rules and principles on the proportionality of penalties, if those articles are interpreted as permitting the automatic collection of provisional securities following exclusion from the tendering procedure.
- 34 That incompatibility would be all the more obvious since a measure such as that at issue, which must be recognised as a penalty, may be adopted without taking into account the subjective element and, in particular, the foreseeability of the exclusion.

WORKING DOCUMENT