

Case C-214/21

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:

3 March 2021

Applicant and appellant:

Italy Emergenza Cooperativa Sociale

Defendant and respondent:

Azienda Sanitaria Provinciale di Cosenza

Intervener:

ANPAS – Associazione Nazionale Pubbliche Assistenze Odv

Subject matter of the main proceedings

Appeal against the judgment of the Tribunale Amministrativo Regionale (TAR) per la Calabria (Regional Administrative Court, Calabria, Italy) dismissing the applicant's action challenging the decisions taken in the selection procedure conducted by the defendant for the award, by direct contracting, to voluntary organisations and the Italian Red Cross of contracts for the provision of emergency ambulance services, on an ongoing basis, 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, including social cooperatives which offer rebates to their members in relation to activities of general interest, within the meaning of Article 3(2a) of Legislative Decree No 112/2017?

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.’

Decreto legislativo 3 luglio 2017, n. 112 – Revisione della disciplina in materia di impresa sociale (Legislative Decree No 112 of 3 July 2017 amending the rules relating to social enterprises), Article 3, ‘Absence of any profit-making objective’: ‘2a. For the purposes referred to in paragraphs 1 and 2, the distribution by social enterprises established in the form of a social cooperative to their members of rebates relating to activities of general interest referred to in Article 2, when carried out in accordance with Article 2545e of the Civil Code and in

compliance with the conditions and limits laid down by law and the articles of association, shall not be regarded as the distribution, either direct or indirect, of profits or surpluses, provided that the articles of association or deed of establishment sets out the criteria for the distribution of the rebates to the members in proportion to the quantity and quality of mutual exchanges and that a mutual surplus is recorded.’

Succinct presentation of the facts and of the procedure

- 1 Italy Emergenza is a non-profit cooperative which belongs to a network of associations. Its objective is the pursuit of the general interest of the community in social advancement and social integration. It specialises, amongst other things, in the provision of ambulance services and is registered as a social enterprise in the Register of Undertakings.
- 2 By an announcement published on 26 February 2020, the Azienda Sanitaria Provinciale di Cosenza (Cosenza Provincial Health Authority; ‘the Health Authority’) launched a selection procedure for the direct award of a contract for the provision of emergency ambulance services, on a continuing basis, to voluntary organisations and the Italian Red Cross.
- 3 In an action before the TAR per la Calabria (Regional Administrative Court, Calabria), Italy Emergenza argued that the Health Authority’s decision not to launch a public call for tenders for the purpose of contracting out the services requested was unlawful. In the alternative, it argued that the terms of the announcement which immediately excluded from the procedure other non-profit organisations, such as cooperatives governed by Italian law, were unlawful. In particular, the applicant complains that the rules which the Health Authority applied, laid down in Articles 56 and 57 of Legislative Decree No 117/2017, are inconsistent with recital 28 and Article 10(h) of Directive 2014/24, on the basis of which social cooperatives are equivalent to voluntary organisations, 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 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 the contracting association had to fulfil all the conditions listed in Article 57 (registration in the national register, membership of a network, social objective, economic efficiency and appropriateness, and so on).

In view of this, 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 selective procedure). In support of that view, the TAR (Regional Administrative 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 rules of EU law 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.

- 8 ANPAS, the national public assistance association, intervened in support of the defendant Health Authority, raising the question of whether social cooperatives may, under Italian law, not only distribute dividends to the extent laid down by Article 2514 of the Civil Code, but also distribute profits, without any legal limit, in the form of rebates (in the case where the mutual activities have resulted in an excess of income over costs). That would automatically exclude them from being non-profit-making.

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

- 9 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.
- 10 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.
- 11 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).
- 12 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).
- 13 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.

- 14 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 by comparison with social cooperatives.
- 15 One further element that might cloud any distinction between the two types of non-profit entity is that, while voluntary associations may have paid 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).
- 16 The Consiglio di Stato (Council of State) observes that it has already raised with the Court of Justice the issue of the consistency of the legislation at issue with EU law and refers to the question referred for a preliminary ruling in Case C-213/21, which is pending before the Court, and to the reasoning set out in that reference. The present question supplements that question, adding at the end: ‘*including social cooperatives which offer rebates to their members in relation to activities of general interest, within the meaning of Article 3(2a) of Legislative Decree No 112/2017*’.

The Consiglio di Stato (Council of State) seeks in this way to establish whether the possibility, governed by the articles of association, for social cooperatives to distribute part of their profits to members in the form of rebates results in their not being non-profit-making associations and thus precludes them from inclusion among the entities to which contracts for services may be awarded by direct contracting in accordance with Article 57 of Legislative Decree No 117/2017. Indeed, distributing rebates – either by means of cost savings or by supplementing remuneration for activities provided – can be a surreptitious way to distribute profits or capital to members, given that, according to the judgment in *Falck Rettungsdienste*, the reinvestment of profits appears to be a mandatory requirement for the purposes of Article 10(h) of [Directive 2014/24].

- 17 It may be gleaned from Article 3(2a) of Legislative Decree No 112/2017 and [Article 2545e] of the Civil Code, in particular, that, social enterprises in corporate form (like the applicant cooperative) are permitted to distribute rebates

relating to activities of general interest subject to specific conditions and restrictions. First and foremost, the budget must balance. Next, there must be a guarantee that the enterprise will continue in existence and will be able to attain its objective based on mutuality in future financial years, by virtue of non-distributable reserves and prudential backstops. A third restriction is that only net profits resulting from the carrying on of activities with members may be distributed. Cooperative companies must therefore keep separate accounts relating to activities with members, who will each receive distributions in proportion to the value of their own exchanges with the company. In any event, individual members have no personal right to receive rebates, which are decided upon by the general assembly, up to the limits laid down by law or in the articles of association, since any hypothetical right to favourable conditions (for example higher remuneration for work performed) could conflict with the protection of the social interest and place members in a position at odds with the cooperative.

- 18 Having set out the legislative context of rebates in general, the Consiglio di Stato (Council of State) sets out Article 34 of the applicant's articles of association, entitled 'Rebates', with a view to establishing whether the cooperative is non-profit-making. That article provides:

'The assembly may, on a proposal from the administrative body, decide upon the distribution of rebates not exceeding 30% of the total pay due to members who are employees.

Rebates shall be allocated in proportion to the quantity and/or quality of the work performed by the members, in accordance with the internal regulations.

Distribution may take effect, on the basis of the assembly's decisions, by way of increased remuneration or the increase, free of charge, of share capital.

Sums distributed to members may be used for the activation of social loans.

The allocation of rebates must in any event make the backstop and the payment referred to in (a) possible [legal non-distributable reserve of not less than 30%) and (b) [payment to mutual fund for the advancement and development of cooperation, at the legal rate].'

- 19 Given the foregoing, the Consiglio di Stato (Council of State) stays the proceedings and refers to the Court the question of whether social cooperatives which, like the applicant enterprise, do not reinvest all the profits and distribute rebates may lawfully be excluded from the award of contracts, by direct contracting, relating to emergency ambulance services.