

Case C-347/24

Request for a preliminary ruling

Date lodged:

13 May 2024

Referring court:

Tribunale Amministrativo Regionale per il Lazio (Italy)

Date of the decision to refer:

7 May 2024

Applicant:

Team Service Soc. cons. arl

Defendant:

Ferservizi SpA

[...] **THE ITALIAN REPUBLIC**

**The Tribunale Amministrativo Regionale per il Lazio (Regional
Administrative Court, Lazio)**

(Sezione Quarta Ter) (Fourth Chamber, Subdivision III)

gives the following

ORDER

in the action [...] brought by Team Service Società Consortile a r.l., [...]

v

Ferservizi S.p.A., [...] in relation to

CNS – Consorzio Nazionale Servizi Soc. Coop., [...]

CNCP – Consorzio Nazionale Cooperative Pluriservizi Attività 360° Società
Cooperativa and Security Service S.r.l., not represented in the proceedings;

seeking the annulment, after interim measures have been adopted,

a) of the measure [...] by which Ferservizi S.p.A. awarded CNS – Consorzio nazionale servizi soc. coop. Lot 1 (North-West geographical area) of tender procedure 15/2023 for the award of contracts for ‘Multiservice and cleaning services with reduced environmental impact, disinfection and complementary services provided by Ferservizi S.p.A. for the buildings used by the companies of the Ferrovie dello Stato Italiane SpA group’ [...];

b) of the actions of the contracting authority, in so far as it failed to exclude from the tender, in relation to Lot 1 – North-West territorial area, CNCP Attività 360° della Rete Ferroviaria Italiana, which came second in the rankings, and Security Service S.r.l., which came third;

c) [if necessary], of the procurement contract (framework agreement) concluded by the contracting authority with the successful bidder CNS – Consorzio nazionale servizi soc. coop. [...];

d) of any other [related] acts and/or measures;

and seeking compensation for the damage sustained and still to be expected,

a) either by specific reinstatement, by taking over the performance of the service and the procurement contract (framework agreement), with the applicant from now declaring itself fully prepared to do so;

b) or by way of compensation equivalent to the loss incurred, in an amount to be quantified in the course of the proceedings, subject to assessment by the court on equitable principles.

[...] Having regard to Article 267 TFEU;

Where:

- the applicant Team Service Società Consortile a r.l. challenged the award, to CNS – Consorzio Nazionale Servizi Soc. Coop., of the framework contract for the provision of ‘multiservice and cleaning services with reduced environmental impact, disinfection and complementary services provided by Ferservizi S.p.A. for the buildings used by the companies of the Ferrovie dello Stato Italiane SpA group’ – geographical Lot 1, alleging an anomaly in the successful bid;

- the contract was awarded following an open tender procedure launched by Ferservizi S.p.A. in accordance with decreto legislativo 18 aprile 2016, n. 50 (Legislative Decree No 50 of 18 April 2016) (‘Implementation of Directives 2014/23/EU, 2014/24/EU and 2014/25/EU on the award of concession contracts, public procurement and procurement by entities operating in the water, energy, transport and postal services sectors, and reforming the existing provisions in

relation to public works, service and supply contracts’), through a notice published in the Official Journal of the European Union on 15 March 2023;

- the estimated value of Lot 1 (‘North-West geographical area’) is EUR 15 713 019.48, excluding VAT, thus in excess of the relevant European thresholds;
- in its defence, Ferservizi S.p.A. denied that it was subject to Directive 2014/25/EU and the national provisions transposing that directive, on the grounds that, first, it qualified as a public undertaking and, second, the contract related to services that are not inherent in the activities referred to in Articles 8 to 14 of the directive;
- according to Ferservizi S.p.A., therefore, the call for an open tender procedure and the compliance with the relevant rules was the result of a free choice [...], with a threefold result: a) the case does not fall within the scope of application of the European directives on procurement; b) civil law should be applied; c) the dispute should be transferred to the ordinary courts [instead of the administrative courts] [...];

FACTS AND LAW:

- according to the national law transposing Directive 2014/25/EU applicable *ratione temporis* to the present case (Article 114 of Legislative Decree No 50 of 18 April 2016), the provisions of the Public Procurement Code and, in particular, the obligation to call a public procurement procedure, apply, in respect of contracts relating to special sectors (which include rail transport services), when an undertaking qualifies as a public undertaking, only where that undertaking carries out one of the activities referred to in Articles 115 to 121 (corresponding to those listed in Articles 8 to 14 of the directive);
- moreover, according to national case-law, ‘the fact of the award of a service being subject to the rules laid down for special sectors cannot be inferred on the basis of a purely subjective criterion – namely the fact that the contract is awarded by an entity operating in special sectors – but is also subject to the application of an objective criterion, which focuses on the degree to which the service concerned is connected to the special sector activity’ [...];
- in particular, ‘a private entity operating by virtue of exclusive rights, like a public undertaking, is required to call a public tender only where two concurrent conditions are met: (a) the private entity operates in special sectors; and (b) the subject of the tender is an activity that has a functional link to the activity carried out in special sectors’. [...] It was further clarified that ‘the concept of a functional link in relation to the procurement contract must be interpreted in a reasonably restrictive manner, meaning a contract that is intended to achieve the purposes (core business) of the special sector activity’ [...];

- on the other hand, for ‘extraneous’ contracts, awarded for purposes other than the activities carried out by public undertakings in special sectors, ‘there is no extension of the rules relating to ordinary sectors but rather the non-application of both directives, resulting in the application of the rules of ordinary law;
- the new Public Procurement Code, approved by decreto legislativo 31 marzo 2023, n. 36 (Legislative Decree No 36 of 31 March 2023) (not applicable in the present case since the case before the court concerns a tender procedure called prior to its entry into force), starts from the assumption that, in accordance with the framework outlined by Directive 2014/25/EU, for public undertakings and for private entities holding special or exclusive powers, that are not public administrations, the requirement to comply with the rules governing public tender procedures, which results in a significant reduction in contractual autonomy [...], cannot happen automatically for any contract award, but is subject to an additional objective and final requirement for this purpose [...] [It] contains a provision at Article 141(2) that – compared to the former Article 114 of Legislative Decree No 50 of 18 April 2016 – makes such requirements more explicit, providing that ‘public undertakings and entities holding special or exclusive rights shall apply the provisions of this Book only for contracts that have a functional link to one of the activities described in Articles 146 to 152’;

Considering that:

- according to national case-law [...], Ferservizi S.p.A. is ‘a public undertaking, subject to management and coordination by Ferrovie dello Stato Italiane S.p.A., the holding company of the FS Group, which provides for the management of non-core business supplies and services not directly related to railway operations in support of the activities of the other FS Group companies and which is, therefore, required to apply the Public Procurement Code exclusively to tender procedures intended to pursue objectives that have a strict functional link to the special sector activity’;
- the consideration [of this company] as a public undertaking derives from the fact that Ferservizi S.p.A. is wholly owned by the parent company Ferrovie dello Stato Italiane S.p.A. (Article 4(2) of Directive 2014/25/EU), which, in turn, constitutes, according to national case-law, a body governed by public law [...] and, therefore, a contracting authority both in ordinary sectors under Article 2(1)(4) of Directive 2014/24/EU and in special sectors under Article 3(4) of Directive 2014/24/EU;
- the court agrees with the classification of Ferservizi S.p.A. as a public undertaking within the meaning of Article 4(2) of Directive 2014/25/EU, since the requirement for a dominant influence on the part of a contracting authority is met, being presumed to exist whenever such an authority holds the majority of the subscribed capital, and since it operates, with the other companies in the group headed by Ferrovie dello Stato S.p.A., in the rail transport sector, which is included in those listed in Articles 8 to 14 of the directive;

- the court also agrees with the classification of the parent company Ferrovie dello Stato Italiane S.p.A. as a body governed by public law, since the three requirements are all met (judgment of 13 January 2005, *Commission v Spain* (C-84/03, EU:C:2005:14)): (I) it has been established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character (as concessionaire, through its subsidiary Rete Ferroviaria Italiana S.p.A., it carries out the management of the national railway infrastructure); (II) it has legal personality [...]; (III) it is financed, for the most part, by the State (being wholly controlled by the Ministry of Economy and Finance);
- lastly, the court agrees with Ferservizi S.p.A. that the contract at issue in this case should be considered extraneous to the activities pertaining to special sectors, since the services covered by the contract relate mainly to buildings used as offices and used by the employees of the companies of the group, which are not accessible to the users of the service and, ultimately, are not strictly related to the operation of the rail transport service;
- this restrictive reading is supported by the most recent case-law position of the Court of Justice, according to which only ‘activities which actually serve to carry out the activity falling within the (...) sector, by enabling that activity to be carried out adequately, having regard to the normal conditions under which it is carried out, to the exclusion of activities carried out for purposes other than the pursuit of the sectoral activity concerned’ are relevant for this purpose (judgment of 28 October 2020, *Pegaso and Sistemi di Sicurezza* (C-521/18, EU:C:2020:867)). It is also supported by national case-law, which, specifically on the subject of rail transport services, has recognised the functional link between the network management activity carried out by Rete Ferroviaria Italiana S.p.A. and the cleaning service (only) of stations, [and related facilities] [...];
- nevertheless, the referring court considers that, in special cases such as that at issue here, the absence of the requirement that the service be functionally linked to the activity falling within special sectors, carried out by the public undertaking, cannot lead, as a rule, to the exclusion of the application of both directives in relation to procurement;
- the specific aspect of the case lies in the fact that the contract is intended for the acquisition of services to be rendered by the successful economic operator also for third parties belonging to the same group of companies, which, if they were to source such services directly on the market, would by their nature be subject to compliance with the directives;
- there is therefore a real risk that conduct circumventing EU law and the principle of competition in the market could occur;
- in particular, having regard to the narrower limits by which it is bound by the rules of open public tenders in relation to the contracting authorities when sourcing supply from the market, a public undertaking could be used by those

authorities, according to different legal frameworks, to carry out purchasing tasks that would essentially amount to simple intermediation for the acquisition of services relating to ‘extraneous contracts’ for those entities, benefiting from the fact that the absence of any requirement for a functional link means that the public undertaking cannot be classified [as] a contracting authority;

- however, the concepts of functional link and inherent connection to the core business of the activity associated with special sectors (to be determined whenever the entity can be classified as a ‘public undertaking’) acquire a meaning only when they relate to a single entity and are viewed in relation to the subject of the contract for services to be rendered to that entity;

- if we take that argument to extremes, it would be sufficient for a contracting authority (in the present case, a body governed by public law), operating in special sectors, which is required in any event to apply the provisions of Directive 2014/25/EU, to set up a public undertaking for the sole purpose of evading the application of the [Union law] rules on procurement, benefiting from the legal regime to which public undertakings are subject, with such undertakings being able to operate without constraints [...] on the market when the contract is ‘extraneous’;

- therefore, given that the absence of a functional link to the activities inherent in special sectors cannot, in any event, result in an extension of the provisions relating to contracts in ordinary sectors (as these are autonomous and distinct bodies of law), or to the classification of the controlled public undertaking as a body governed by public law [...], in the view of the referring court, the provisions of Directive 2014/25/EU must in any event be applied in all cases in which the services that are the subject matter of the contract referred to in the call for tenders issued by the public undertaking are, in substance, to be rendered for the benefit of entities operating in special sectors that qualify as contracting authorities, which are otherwise required to comply with the rules on open public procurement, irrespective of whether that functional link has been established;

- the case being examined by the referring court concerns a public undertaking (Ferservizi S.p.A.), which constitutes the ‘Integrated Service Centre’ of the Ferrovie dello Stato group, as it manages ‘back office’ activities for the parent company and the FS Group companies, namely those activities not directly connected to railway operations, playing a supporting role to the core business [...] and constantly improving the efficiency of the processes managed’, and deals with ‘non-core’ purchases, operating on a market basis [...];

- therefore, it is clear that an entity with such characteristics risks becoming a means for the parent contracting authority to circumvent the application of both directives, since, by definition, it could never be considered as a contracting entity for the purposes of the application of Directive 2014/25/EU (since it deals with acquisitions not associated with the core business of the companies of the group)

or as a contracting authority for the purposes of the application of Directive 2014/24/EU (since it is a public undertaking operating in special sectors);

- in this respect, it should be reiterated that, in line with its corporate purpose, the tender procedure launched by Ferservizi S.p.A. relates to the awarding of contracts for ‘multiservice and cleaning services with reduced environmental impact, disinfection and complementary services provided by Ferservizi S.p.A. for the buildings used by the companies of the Ferrovie dello Stato Italiane SpA group’, and thus to a number of companies, all of which are subject to the management and control of the parent company Ferrovie dello Stato Italiane S.p.A., a body governed by public law [...];

- [...] [*further considerations along the same lines*];

- finally, it seems appropriate to note that the Court of Justice of the European Union itself has held that ‘a company which, on the one hand, is wholly owned by a contracting authority whose activity consists of meeting needs in the general interest and which, on the other, carries out both transactions for that contracting authority and transactions on the competitive market must be classified as a “body governed by public law” (...) provided that the activities of that company are necessary for the contracting authority to exercise its own activity and, in order to meet needs in the general interest, that company is able to be guided by non-economic considerations, which it is for the referring court to ascertain’ (judgment of 5 October 2017, *LitSpecMet* (C-567/15, EU:C:2017:736)) specifically with reference to a tender procedure launched by a commercial company controlled by the Lithuanian State railway company);

- in conclusion, the court wishes to refer the following question on the interpretation of European Union law to the Court of Justice of the European Union for a preliminary ruling under Article 267 TFEU: *is a public undertaking operating in special sectors (a contracting entity within the meaning of Article 4(2) of Directive 2014/25/EU, as transposed by Articles 114 et seq. of Legislative Decree No 50 of 18 April 2016), which is classified as a public undertaking because it is subject to a dominant influence by a contracting authority, in particular a body governed by public law (Article 2(1)(4) of Directive 2014/25/EU), which holds a majority of its capital, required to comply with the provisions of Directive 2014/25/EU when it intends to conclude a procurement contract for the provision of services, for an amount in excess of the European thresholds, relating to services that are not strictly related to the activities referred to in Articles 8 to 14 of Directive 2014/25/EU but which are intended to meet exclusively or principally the needs of the controlling body governed by public law and of companies controlled by that body?;*

- [...] [*proceedings*]

ON THOSE GROUNDS

The Lazio Regional Administrative Court (Section 4b):

- a) refers the question set out above to the Court of Justice of the European Union for a preliminary ruling;
- b) [...];
- c) orders that the present case be suspended, pending the ruling of the Court of Justice of the European Union.

[...] Rome [...] 23 April 2024 [...]

WORKING DOCUMENT