ECLI:EU:C:2016:56

JUDGMENT OF THE COURT (Fifth Chamber)

28 January 2016 (*)

(Reference for a preliminary ruling — Public contracts — Articles 49 TFEU and 56 TFEU — Directive 2004/18/CE — Medical transport services — National legislation authorising regional health authorities to entrust medical transport activities to registered voluntary associations fulfilling the legal requirements, directly and without advertising, by means of reimbursement of the expenditure incurred — Lawfulness)

In Case C-50/14

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunale Amministrativo Regionale per il Piemonte (Regional Administrative Court of Piedmont, Italy), made by decision of 9 January 2014, received at the Court on 3 February 2014, in the proceedings

**Consorzio Artigiano Servizio Taxi e Autonoleggio (CASTA) and Others**

v

**Azienda Sanitaria Locale di Ciriè, Chivasso e Ivrea (ASL TO4),**

**Regione Piemonte,**

intervening parties:

**Associazione Croce Bianca del Canavese and Others,**

**Associazione Nazionale Pubblica Assistenza (ANPAS)** ? **Comitato Regionale Liguria,**

THE COURT (Fifth Chamber),

composed of T. von Danwitz, President of the Fourth Chamber, acting as President of the Fifth Chamber, D. Šváby (Rapporteur), A. Rosas, E. Juhász and C. Vajda, Judges,

Advocate General: N. Wahl,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Consorzio Artigiano Servizio Taxi e Autonoleggio (CASTA) and Others, by M. Bellardi and P. Troianello, avvocati,

– Azienda sanitaria locale di Ciriè, Chivasso e Ivrea (ASL TO4), by F. Dealessi, avvocato,

– Associazione Croce Bianca del Canavese and Others, by E. Thellung De Courtelary and C. Tamburini, avvocati,

– Associazione nazionale pubblica assistenza (ANPAS) — Comitato regionale Liguria, by R. Damonte, avvocato,

– the Italian Government, by G. Palmieri, acting as Agent, and P. Gentili, avvocato dello Stato,

– the Czech Government, by M. Smolek, J. Vláčil and T. Müller, acting as Agents,

– the European Commission, by L. Pignataro-Nolin and A. Tokár, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

**Judgment**

1 This request for a preliminary ruling concerns the interpretation of Articles 49 TFEU and 56 TFEU.

2 The request has been made in proceedings between Consorzio Artigiano Servizio Taxi e Autonoleggio (CASTA) and two transport operators (‘CASTA and Others’) and Azienda Sanitaria Locale di Ciriè, Chivasso e Ivrea (ASL TO4) (Local Health Authority of Ciriè, Chivasso et Ivrea (ASL TO4)) and the Regione Piemonte (Region of Piedmont) concerning, first, the award, with no competitive tendering, of the service of transporting dialysis patients to various health care establishments, for the period from June to

December 2013, to Associazione Croce Bianca del Canavese and to several other voluntary associations ('Associazione Croce Bianca and Others') and, secondly, the authorisation of the related expenditure.

## Legal context

*European Union ('EU') law*

3 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 (OJ 2004 L 134, p. 114 and corrigendum OJ 2004 L 351, p. 44), as amended by Commission Regulation (EU) No 1251/2011 of 30 November 2011 (OJ 2011 L 319, p. 43) ('Directive 2004/18'), contains the following definitions in Article 1(2) and (5):

'2. (a) "Public contracts" are contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services within the meaning of this Directive.

...

(d) "Public service contracts" are public contracts other than public works or supply contracts having as their object the provision of services referred to in Annex II.

...

5. A "framework agreement" is an agreement between one or more contracting authorities and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged.'

4 The applicability of Directive 2004/18 to the award of public service contracts is subject to various conditions, in particular as regards the value of those contracts and the kind of services concerned.

5 Thus, first, in accordance with the first and third indents of Article 7(b), Directive 2004/18 applies, inter alia, to public service contracts with a value of EUR 200 000 or more (before value added tax) which have as their object the services listed in Annex II A to that directive awarded by contracting authorities other than the central government authorities listed in Annex IV of that directive or which have as their object the services listed in Annex II B thereto. Under Article 9(9) of that directive, the value to be taken into consideration in respect of framework agreements is the maximum estimated value of all the contracts envisaged for the total term of the framework agreement concerned. According to Article 9(8)(b)(ii) of Directive 2004/18, in the case of contracts without a

fixed term, the value to be taken into consideration is limited to the monthly value of such a contract multiplied by 48.

6 Secondly, under Articles 20 and 21 of Directive 2004/18, contracts which have as their object services listed in Annex II A of that directive are to be awarded in accordance with Articles 23 to 55 thereof, whereas contracts which have as their object services listed in Annex II B of that directive are to be awarded in accordance with Articles 23 and 35(4) only thereof, which concern, respectively, the technical specifications and the notice of the results of the procurement procedure. In accordance with Article 22 of Directive 2004/18, contracts which have as their object services listed both in Annex II A and in Annex II B of that directive are to be awarded in accordance with Articles 23 to 55 thereof where the value of the services listed in Annex II A is greater than the value of the services listed in Annex II B, or, in other cases, in accordance only with Articles 23 and 35(4) of that directive.

7 Category 2 in Annex II A to Directive 2004/18 concerns land transport services, including armoured car services and courier services, except transport of mail. Category 25 in Annex II B to that directive covers health and social services.

8 Finally, in accordance with Article 32(2) of Directive 2004/18, the conclusion of a framework agreement means that contracting authorities are to follow the rules of procedure laid down by that directive in all the phases of that agreement up to the award of contracts based on it.

*Italian law*

9 In accordance with the principle of solidarity laid down in Article 2 of the Constitution of the Italian Republic and the principle of subsidiarity guaranteed by Article 118 thereof, both national and regional Italian law attribute an active role in providing health services to voluntary associations, characterised by the absence of profit-making, the prevalence of services supplied in voluntary form and the marginal nature of commercial or production activities.

10 Accordingly, Articles 1 and 45 of Law No 833 on the establishment of the national health service (legge n. 833 — Istituzione del servizio sanitario nazionale) of 23 December 1978 (Ordinary supplement to GURI No 360 of 28 December 1978) recognise the role, in the functioning of the national health service, of voluntary associations and benevolent institutions whose object it is to contribute to the attaining of the institutional objectives of that service. It provides that that contribution is to take the form of agreements concluded with the local health bodies in accordance with planning and legislation laid down at regional level.

11 The voluntary nature of such participation is regulated at national level by Law No 266 setting out a framework on voluntary work (legge No 266 — Legge-quadro sul volontariato) of 11 August 1991 (GURI No 196, of 22 August 1991, ‘Law

No 266/1991’). Article 1 thereof sets out the principle of the recognition of voluntary work in the following terms:

‘The Italian Republic recognises the social value and function of voluntary work as an expression of solidarity and pluralism, fosters its development while preserving its independence and encourages individual contributions in the pursuit of social, civil and cultural objectives set by the State, the Regions, the Autonomous Provinces of Trentino and Bolzano and the local authorities.’

12 In accordance with Article 3 of Law No 266/1991, a voluntary association is any organisation set up with the aim of undertaking voluntary activities having overall and primary recourse to the individual, voluntary and unpaid services of its members, the same article authorising such an organisation to use employed or self-employed workers only to the extent necessary for its day-to-day functioning or having regard to the type or specialisation of the activity. That article also provides that voluntary associations pursue their activity either through their own infrastructures or by means of public facilities or infrastructures that have entered an agreement with those public facilities.

13 Article 5 of Law No 266/1991 lists the means by which voluntary associations may be financed. These include payments made on the basis of agreements concluded with public bodies and income received from marginal commercial or production activities.

14 Finally, Article 7 of that Law governs the conclusion of such agreements with public bodies, which must regulate the activities of the associations as regards, inter alia, the quality of the services, and must also make provision for the manner in which expenses incurred are to be repaid.

15 That regulatory framework is set out and implemented in the Region of Piedmont by Regional Law No 38 on the enhancement and promotion of voluntary work (legge regionale n. 38 — Valorizzazione e promozione del volontariato) of 29 August 1994. Article 9 of that law provides, inter alia, that contracts concluded between that region, local authorities or other public authorities established in its territory, on the one hand, and voluntary organisations, on the other, must identify user categories, the services to be provided and the arrangements for providing those services, as well as the arrangements for reimbursing the costs of insurance cover and documented costs incurred by the contracting organisation in carrying on the activity covered by the contract, together with the arrangements for checking implementation of the contract, including through regular meetings between the heads of public services and the operational heads of that organisation.

**The dispute in the main proceedings and the questions referred for a preliminary ruling**

16 As part of the national health service, ASL TO4 supplies transport services to dialysis patients, thereby providing them with physical access to health care establishments in circumstances where those patients are unable to gain access on their

own. That service meets the dual objective of rendering physically and economically accessible a health service provided as part of the national health service.

17 By his Decision No 381 of 31 May 2013, the Director-General of ASL TO4 awarded that service, by contract, for the period from June to December 2013, to the voluntary associations belonging to the Associazione nazionale pubblica assistenza (ANPAS) — Comitato regionale Piemonte (national association of public assistance groups — Piedmont Regional Committee), that is, the Associazione Croce Bianca and others. The parties in the main proceedings who submitted written observations to the Court indicated different amounts regarding the budget provision to cover the costs involved during this period, ranging from EUR 195 975.37 to EUR 277 076.61.

18 CASTA and others, who operate in the taxi transport and car-with-driver hire sectors, or their representatives, contested that decision before the tribunale amministrativo regionale per il Piemonte (Regional Administrative Court of Piedmont) alleging, inter alia, infringement of EU law. It is apparent from the documents before the Court that CASTA and others provided the service in question in the main proceedings to ASL TO4 until 30 May 2013.

19 It is also clear from those documents that the Regional Government of Piedmont (Giunta regionale del Piemonte) and ANPAS — Comitato regionale Piemonte, as the regional coordination body, concluded an agreement to regulate relations between the local health authorities of that region and the voluntary associations with regard to medical transport services. That agreement was approved by a decision of the Regional Council of Piedmont of 12 November 2007 and was extended.

20 The referring court points out that the subject-matter of the contract at issue in the main proceedings, as a whole, is a number of transport services, such as emergency transport, of which the transport of dialysis patients accounts for only a minor part. Furthermore, ASL TO4 entered into contracts with other voluntary associations also for the purpose of medical transport services, which are not, however, at issue in the main proceedings. According to that court, those contracts stipulate that only the actual costs corresponding to documented expenses may be reimbursed. The referring court states that the allocation of the use of premises close to hospital structures and of meal vouchers to persons carrying out the services referred to in those contracts is also provided for, but it considers that those measures are not contrary to the principle of limiting financial payments to the reimbursement of documented expenses, since they are intended only to enable the provision of the services concerned in their entirety, taking into account the emergency transport service.

21 It is apparent from the decision to refer that the use of voluntary associations for the services concerned has allowed ASL TO4 to make considerable savings on the cost of the service provided.

22 The referring court points out that EU law seems to reserve a particular treatment to social and health services where a Member State chooses to entrust the performance of

those services to not-for-profit bodies. It refers, in that regard, to the judgment in *Sodemare and Others* (C-70/95, EU:C:1997:301) and to the preparatory work for the new directive on public procurement, which was then under way and which has since led to the adoption 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), and in particular to recital 28 in the preamble thereto. That recital states, inter alia, that that directive should not apply to certain emergency services where they are performed by non-profit organisations or associations, since the particular nature of those organisations would be difficult to preserve if the service providers had to be chosen in accordance with the procedures set out in that directive.

23 The referring court also notes, by reference, in particular, to the judgment in *Ambulanz Glöckner* (C-475/99, EU:C:2001:577) that, in accordance with the case-law of the Court, the fact that an organisation which engages in an economic activity, in particular a medical transport activity, is not profit-making does not mean that it is not an undertaking, within the meaning of the provisions of the FEU Treaty, so that voluntary associations may engage in an economic activity in competition with other economic operators, inter alia by taking part in tendering procedures. The referring court adds that that case-law has also established that the concept of a 'contract for pecuniary interest', within the meaning of Article 1(2)(a) of Directive 2004/18, also refers to contracts in which the agreed remuneration is limited to reimbursement of the expenditure incurred to provide the agreed service, by reference, in particular, to the judgment in *Ordine degli Ingegneri della Provincia di Lecce and Others* (C-159/11, EU:C:2012:817).

24 Having regard to all of those considerations, the referring court considers it necessary for the principles of competition to be coordinated with the other, specific requirements concerning the participation of voluntary associations in providing social and health services in the context of the public health service, since, while it is true that voluntary associations were eligible in theory to participate in public tendering procedures as 'commercial operators', within the meaning of Directive 2004/18, that does not entail a corresponding obligation on their part to act as such in any circumstances, and still less does it mean that they were created for the purpose of commercial activity.

25 Moreover, to require those organisations to carry out a commercial activity, rather than simply allowing them to do so, would have the paradoxical result of rendering voluntary work impracticable for health services in the widest sense, whereas social cohesion, subsidiarity and even the economic sustainability of the services provided by public authorities are particularly relevant in that sector.

26 In that context, the referring court considers that, since the contracts at issue in the main proceedings concern services which are within the scope of the public health service and the mechanism for concluding those contracts satisfies the strict requirements relating to the reimbursement of costs, the voluntary associations are operating outside the commercial field and therefore derogations from the public tendering procedure are justified. This is all the more true, since the legislature observed, during the adoption of Directive 2014/24, that the preservation of the unique nature of non-profit organisations

is hardly compatible with participation in a selection in the context of a public tendering procedure and that, by very fact of using voluntary labour, a tender from a voluntary organisation would hardly be comparable to that from a traditional economic operator.

27 However, according to that court, the administrative authority concerned should make a comparison between the tenders of the interested voluntary associations, possibly established in a Member State other than the Italian Republic, to ensure that the reimbursements do not cover unnecessary management costs.

28 Finally, assuming that voluntary associations can turn to the ordinary market, it seems necessary, according to the referring court, to ensure that there are certain limits, in order to avoid distortions of competition in the market with traditional economic operators. The fact that Italian legislation prohibits those associations from engaging in non-marginal commercial activities would be enough to avert the risk of any significant distorting effect. Consideration could, however, be given to quantifying that marginal nature by drawing on the limits provided for in Directive 2014/24 regarding the right of a contracting authority to contract directly with another contracting authority.

29 In those circumstances, the tribunale amministrativo regionale per il Piemonte (Regional Administrative Court of Piedmont) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Does European Union public procurement law — in the case under examination, concerning [contracts excluded from the scope of application of Directive 2004/18] and the general principles of free competition, equal treatment, transparency and proportionality — preclude national legislation under which contracts for the provision of ambulance and health-related transport services may be awarded directly to voluntary organisations organised predominantly on the basis of unpaid work and in return for genuine reimbursement of costs?

(2) If such an award is regarded as compatible with EU law, must there be a prior comparison of tenders from several comparable operators (possibly including operators from other Member States) and recipients of a direct award in order to limit the risk of exposure to inefficient or unreasonable costs, and must the national law under which direct awards are permitted accordingly be construed to that effect?

(3) If such an award is regarded as compatible with EU law, must voluntary organisations which receive direct awards be subject to precise percentage limits on parallel access to the market, and must the provision of national law under which the commercial activity of those organisations has to be marginal accordingly be construed to that effect?

**Admissibility of the request for a preliminary ruling**

30 The Italian Government disputes the admissibility of the request for a preliminary ruling owing to the absence of sufficient information, in the decision to refer, regarding

the nature of the services at issue in the main proceedings or the existence of a cross-border interest, which makes it impossible to assess whether EU law is in fact applicable in the present case.

31 That plea of inadmissibility must be rejected.

32 First, the information supplied in the decision to refer regarding the nature of services that constitute the object of the contracts at issue in the main proceedings, namely medical transport services, and in particular the transport of dialysis patients, who are not capable of accessing their treatment independently, and regarding the context in which those contracts were concluded are sufficient to allow the interested parties properly to submit their observations on the questions referred and to allow the Court to respond to them.

33 Secondly, it must be stated that, as is apparent from reading the first question referred, the referring court admittedly starts from the premise that, in the present case, Directive 2004/18 is not applicable, so that only the relevant principles of the Treaty, and the obligation of transparency that they impose, are applicable.

34 However, this is not the only premise that must be taken into consideration.

35 It must be pointed out, in the first place, that Directive 2004/18 applies to public service contracts, which Article 1(2)(d) thereof defines as public contracts other than public works or supply contracts having as their object the provision of services referred to in Annex II thereto.

36 That annex is divided into two parts, A and B. Medical transport services, such as those at issue in the main proceedings, are, according to the information provided by the referring court, covered by Category 2 in Annex II A to Directive 2004/18 as regards the transport aspects of those services, and by Category 25 in Annex II B to that directive as regards the medical aspects thereof (see, with regard to emergency ambulance services, judgment in *Azienda sanitaria locale No 5 'Spezzino' and Others*, C-113/13, EU:C:2014:2440, paragraph 34 and the case law cited therein).

37 With regard to mixed services covered by Annexes II A and II B to Directive 2004/18, Article 22 thereof is applicable. In accordance with that article, public contracts the value of which exceeds the relevant threshold laid down in Article 7 thereof and which concern such mixed services must be awarded in accordance with Articles 23 to 55 of that directive where the value of the transport services, listed in Annex II A, is greater than the value of the medical services, listed in Annex II B (see judgment in *Azienda sanitaria locale No 5 'Spezzino' and Others*, C-113/13, EU:C:2014:2440, paragraph 40).

38 Conversely, that is to say, where the value of the medical services exceeds that of the transport services, the contract must be awarded in accordance only with Articles 23 and 35(4) of Directive 2004/18. By contrast, the other rules laid down in that directive in relation to the coordination of procedures, in particular those applicable to the

requirements to put out contracts to competition by means of prior advertising and those relating to the award criteria, are not applicable to such contracts (judgment in *Azienda sanitaria locale No 5 'Spezzino' and Others*, C-113/13, EU:C:2014:2440, paragraph 41 and the case-law cited).

39 The EU legislature took as its starting-point the assumption that contracts for the services referred to in Annex II B to Directive 2004/18 are, in principle, in the light of their specific nature, not of sufficient cross-border interest to justify their award being subject to the conclusion of a tendering procedure intended to enable undertakings from other Member States to examine the contract notice and submit a tender (judgment in *Azienda sanitaria locale No 5 'Spezzino' and Others*, C-113/13, EU:C:2014:2440, paragraph 42 and the case-law cited).

40 It follows from paragraphs 38 and 39 of the present judgment that, where the value of the contract in question in the main proceedings exceeds the relevant threshold laid down in Article 7 of Directive 2004/18, the contract award procedure must comply with the rules laid down in that directive. Thus, depending on whether or not the value of the transport services exceeds the value of the medical services, either all the procedural rules in that directive or solely those in Articles 23 and 35(4) thereof are applicable. It is for the referring court to ascertain whether that contract is covered by both Annex II A to Directive 2004/18 and Annex II B thereto and whether that agreement exceeds the threshold for application. Moreover, it is for the referring court to determine the value of the respective transport and medical services in question (see, to that effect, judgment in *Azienda sanitaria locale No 5 'Spezzino' and Others*, C-113/13, EU:C:2014:2440, paragraph 43)

41 If the value of the contract at issue in the main proceedings exceeds the relevant threshold laid down in Article 7 and the value of the transport services exceeds that of the medical services, Directive 2004/18 will be fully applicable. By contrast, if the referring court were to find that either the threshold has not been reached or that the value of the medical services exceeds the value of the transport services, only the general principles of transparency and equal treatment flowing from Articles 49 TFEU and 56 TFEU would be applicable in addition to Articles 23 and 35(4) of Directive 2004/18 (see, to that effect, judgment in *Azienda sanitaria locale No 5 'Spezzino' and Others*, C-113/13, EU:C:2014:2440, paragraph 44, 45 and the case-law cited).

42 However, in order for those principles to apply in relation to public procurement activities in respect of which all the relevant elements are confined to a single Member State, it is necessary for the contract at issue in the main proceedings to be of certain cross-border interest (judgment in *Azienda sanitaria locale No 5 'Spezzino' and Others*, C-113/13, EU:C:2014:2440, paragraph 46 and the case-law cited).

43 Furthermore, it cannot be ruled out that the contract at issue in the main proceedings was concluded on the basis of the agreement entered between the Regional Government of Piedmont and ANPAS — Comitato regionale Piemonte, as the regional coordination body, to regulate relations between the local health authorities of that region

and the voluntary associations belonging to that body with regard to medical transport services.

44 Such an agreement must be regarded as a framework agreement, within the meaning of Directive 2004/18, if it satisfies the definition set out in Article 1(5) thereof, which covers any agreement between one or more contracting authorities and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where relevant, the quantity envisaged, it being understood that a framework agreement does not need to establish all the terms of subsequent contracts, as is clear from the second indent of the second subparagraph of Article 32(4) of that directive. It is for the referring court to carry out the required assessments regarding the agreement referred to in the preceding paragraph of the present judgment and to check whether it is a framework agreement within the meaning of Directive 2004/18 and, if so, whether the contract at issue was concluded on the basis of that framework agreement.

45 In that regard, it must be pointed out, first, that under Article 9(9) of Directive 2004/18, the value to be taken into consideration in respect of framework agreements is the maximum estimated value of all the contracts envisaged for the total term of the framework agreement concerned.

46 Second, with regard to the applicability of Directive 2004/18 or of the general principles of transparency and equal treatment flowing from Articles 49 TFEU and 56 TFEU to such a framework agreement, the assessments set out, in particular, in paragraphs 37, 38, 41 and 42 of the present judgment are applicable. If the referring court finds that Directive 2004/18 is fully applicable to that framework agreement, it must be pointed out that, in accordance with Article 32(2) of Directive 2004/18, the conclusion of a framework agreement means that contracting authorities are to follow the rules of procedure laid down by that directive in all the phases of that framework agreement up to the award of contracts based on it. That provision requires, moreover, that contracts based on a framework agreement must be awarded in accordance with the terms set forth in that framework agreement and the procedures provided for in Article 32(3) and (4) of Directive 2004/18.

47 However, although the referring court starts from the premise that the general principles of transparency and equal treatment flowing from Articles 49 TFEU and 56 TFEU are applicable, it has not established the facts necessary for this Court to ascertain whether, in the case in the main proceedings, there is certain cross-border interest. As is clear from Article 94 of the Rules of Procedure of the Court of Justice, the Court must be able to find in a request for a preliminary ruling a summary of the facts on which the questions are based and the connection, inter alia, between those facts and the questions. Therefore, the findings necessary to verify the existence of certain cross-border interest, and more generally all the findings to be made by the national courts and on which the applicability of an act of secondary and primary legislation of the European Union depends, must be made before the questions are referred to the Court (see judgment in

*Azienda sanitaria locale No 5 'Spezzino' and Others*, C-113/13, EU:C:2014:2440, paragraph 47).

48 In view of the spirit of judicial cooperation which governs relations between national courts and the Court of Justice in the context of preliminary ruling proceedings, the fact that the referring court did not make those initial findings relating to the possible existence of certain cross-border interest does not mean, however, that the request for a preliminary ruling is inadmissible if, in spite of those deficiencies, the Court, in the light of the information contained in the court file, considers that it is in a position to provide a useful answer to the referring court. That is the case, in particular, where the decision to refer contains sufficient relevant information for the existence of such an interest to be determined. Nevertheless, the response provided by the Court takes effect only if it is possible for the referring court to establish certain cross-border interest in the case at issue in the main proceedings, on the basis of a detailed assessment of all the relevant facts in the case in the main proceedings (see judgment in *Azienda sanitaria locale No 5 'Spezzino' and Others*, C-113/13, EU:C:2014:2440, paragraph 48 and the case-law cited).

49 Subject to that proviso, it must be held that the general principles of transparency and equal treatment flowing from Articles 49 TFEU and 56 TFEU may, in principle, be applicable to the contracts at issue in the main proceedings and, where relevant, to the framework agreement regulating them.

50 Consequently, the request for a preliminary ruling must be held to be admissible.

**The questions referred for a preliminary ruling**

*The first question referred:*

51 By its first question, the referring court asks, in essence, whether the rules of EU law on public procurement must be interpreted as precluding national legislation which, like that at issue in the main proceedings, allows local authorities to entrust the provision of medical transport services by direct award, without any form of advertising, to voluntary associations which, for the provision of those services, receive only reimbursement of the expenditure actually incurred for that purpose.

52 It should at the outset be noted that a contract cannot fall outside the concept of public contract merely because the remuneration is limited to reimbursement of the expenditure incurred to provide the agreed service or because the contract is concluded with a non-profit-making body (see, to that effect, judgment in *Azienda sanitaria locale No 5 'Spezzino' and Others*, C-113/13, EU:C:2014:2440, paragraphs 36 and 37 and the case-law cited).

53 However, the answer to the question referred depends on whether Directive 2004/18 is fully applicable or, instead, the general principles of transparency and equal treatment flowing from Articles 49 TFEU and 56 TFEU must be taken into account.

54 In the first case, it should be considered that Directive 2004/18 precludes national legislation, such as that at issue in the main proceedings, which allows local authorities to entrust the provision of medical transport services by direct award, without any form of advertising, to voluntary bodies (see, to that effect, judgment in *Azienda sanitaria locale No 5 'Spezzino' and Others*, C-113/13, EU:C:2014:2440, paragraph 44).

55 In the second case, it must be noted, first, that EU law on public procurement, in so far as it concerns, inter alia, public service contracts, is intended to ensure the free movement of services and the opening-up to competition in the Member States which is undistorted and as wide as possible and, secondly, it must be found that the application of national legislation such as that at issue in the main proceedings leads to a result contrary to those objectives, since it excludes for-profit entities from the markets concerned (see, to that effect, judgment in *Azienda sanitaria locale No 5 'Spezzino' and Others*, C-113/13, EU:C:2014:2440, paragraphs 51 and 52).

56 The award, in the absence of any transparency, of a contract to an undertaking located in the same Member State as the contracting authority amounts to a difference in treatment to the detriment of undertakings which might be interested in that contract but are established in another Member State. Unless it is justified by objective circumstances, such a difference in treatment, which, by excluding all undertakings established in another Member State, operates mainly to the detriment of the latter undertakings, amounts to indirect discrimination on the basis of nationality, prohibited under Articles 49 TFEU and 56 TFEU (judgment in *Azienda sanitaria locale No 5 'Spezzino' and Others*, C-113/13, EU:C:2014:2440, paragraph 52 and the case-law cited).

57 However, it follows from all these considerations, namely the national legal framework, the nature of the services concerned, which fall within the context of the national health service, the findings of the referring court regarding the positive budgetary impact of contracts such as those at issue in the main proceedings and the fact that, by their very nature, the associations that are signatories to such contracts are voluntary, that the use of those associations in the organisation of the medical transport service is likely to be grounded in the principles of universality, the good of the community and in reasons of economic efficiency and suitability, in so far as it allows that public service to be provided in an economically balanced manner for budgetary purposes, by bodies constituted, essentially, for the purpose of public service.

58 Such objectives are taken into consideration by EU law.

59 In that connection, it must be recalled, in the first place, that EU law does not detract from the power of the Member States to organise their public health and social security systems (judgment in *Azienda sanitaria locale No 5 'Spezzino' and Others*, C-113/13, EU:C:2014:2440, paragraph 55 and the case-law cited).

60 Admittedly, in the exercise of that power the Member States may not introduce or maintain unjustified restrictions on the exercise of fundamental freedoms in the area of health care. However, in the assessment of compliance with that prohibition, account

must be taken of the fact that the health and life of humans rank foremost among the assets or interests protected by the Treaty and it is for the Member States, which have a discretion in the matter, to decide on the degree of protection which they wish to afford to public health and on the way in which that degree of protection is to be achieved (judgment in *Azienda sanitaria locale No 5 'Spezzino' and Others*, C-113/13, EU:C:2014:2440, paragraph 56 and the case-law cited).

61 Furthermore, not only the risk of seriously undermining the financial balance of a social security system may constitute per se an overriding reason in the general interest capable of justifying an obstacle to the freedom to provide services, but also the objective of maintaining, on grounds of public health, a balanced medical and hospital service open to all may also fall within one of the derogations, on grounds of public health in so far as it contributes to the attainment of a high level of health protection. Thus, measures which aim, first, to meet the objective of guaranteeing in the territory of the Member State concerned sufficient and permanent access to a balanced range of high-quality medical treatment and, secondly, assist in ensuring the desired control of costs and prevention, as far as possible, of any wastage of financial, technical and human resources are also covered (judgment in *Azienda sanitaria locale No 5 'Spezzino' and Others*, C-113/13, EU:C:2014:2440, paragraph 57 and the case-law cited).

62 In the second place, a Member State, in the context of its discretion to decide the level of protection of public health and to organise its social security system, may take the view that recourse to voluntary associations is consistent with the social purpose of a medical transport service and may help to control costs relating to that service (see, to that effect, judgment in *Azienda sanitaria locale No 5 'Spezzino' and Others*, C-113/13, EU:C:2014:2440, paragraph 59).

63 However, a system of organisation of a medical transport service such as that at issue in the main proceedings, which enables the competent authorities to use voluntary associations, must actually contribute to the social purpose and the pursuit of the objectives of the good of the community and budgetary efficiency on which that system is based (judgment in *Azienda sanitaria locale No 5 'Spezzino' and Others*, C-113/13, EU:C:2014:2440, paragraph 60).

64 In that connection, it is essential that, where they act in that context, the voluntary associations do not pursue objectives other than those mentioned in the previous paragraph of the present judgment, do not make any profit as a result of their services, apart from the reimbursement of the variable, fixed and on-going expenditure necessary to provide them, and do not procure any profit for their members. Furthermore, although it is permissible to maintain a workforce, for it would, without one, be almost impossible for those associations to act effectively in numerous domains in which the principle of the good of the community may naturally be implemented, the activities of those associations must strictly comply with the requirements laid down by national law (judgment in *Azienda sanitaria locale No 5 'Spezzino' and Others*, C-113/13, EU:C:2014:2440, paragraph 61).

65 Having regard to the general principle of EU law on the prohibition of abuse of rights, the application of that legislation cannot be extended to cover the wrongful practices of voluntary associations or their members. Thus, the activities of voluntary associations may be carried out by the workforce only within the limits necessary for their proper functioning. As regards the reimbursement of costs, it must be ensured that profit making, even indirect, cannot be pursued under the cover of a voluntary activity and that volunteers may be reimbursed only for expenditure actually incurred for the activity performed, within the limits laid down in advance by the associations themselves (judgment in *Azienda sanitaria locale No 5 'Spezzino' and Others*, C-113/13, EU:C:2014:2440, paragraph 62).

66 In the eventuality referred to in paragraph 55 of the present judgment, it is for the national court to carry out all the assessments required in order to verify whether the contract and, where relevant, the framework agreement at issue in the main proceedings, as regulated by the applicable legislation, actually contribute to the social purpose and the pursuit of the objectives of the good of the community and budgetary efficiency.

67 Having regard to all of the foregoing considerations, the answer to the first question is that Articles 49 TFEU and 56 TFEU must be interpreted as meaning that they do not preclude national legislation, such as that at issue in the main proceedings, which allows local authorities to entrust the provision of medical transport services by direct award, without any form of advertising, to voluntary associations, provided that the legal and contractual framework in which the activity of those associations is carried out actually contributes to the social purpose and the pursuit of the objectives of the good of the community and budgetary efficiency.

*The second question*

68 By its second question, based on the assumption that Directive 2004/18 is not applicable to a contract such as that at issue in the main proceedings, the referring court asks essentially whether, where a Member State allows the public authorities to have direct recourse to voluntary associations to carry out certain tasks, in accordance with the conditions laid down in that regard by EU law, a public authority that intends to conclude contracts with such associations is required to compare, in advance, the proposals of various associations in order to avoid any unnecessary costs.

69 In that regard, it should be noted that, in accordance with the operative part of the judgment in *Azienda sanitaria locale No 5 'Spezzino' and Others* (C-113/13, EU:C:2014:2440) and with paragraph 67 of the present judgment, when all conditions are met which, under EU law, allow a Member State to provide for the use of voluntary associations, the provision of medical transport services may be entrusted to those associations by direct award, without any form of advertising.

70 The absence of any advertising requirement means that public authorities that make use of voluntary associations, under those conditions, are not required under EU law to organise a comparison between voluntary bodies.

71 Nevertheless, it must be noted that, as pointed out in paragraph 60 of the judgment in *Azienda sanitaria locale No 5 'Spezzino' and Others* (C-113/13, EU:C:2014:2440) and in paragraph 63 of the present judgment, the lawfulness of the use of voluntary associations is subject, in particular, to the condition that such use actually contributes to the objective of budgetary efficiency. Therefore, the arrangements for implementing that use, such as those laid down in the contracts concluded with those associations and in any framework agreement, must also contribute to the achievement of that objective. Furthermore, as pointed out in paragraph 62 of the judgment in *Azienda sanitaria locale No 5 'Spezzino' and Others* (C-113/13, EU:C:2014:2440) and in paragraph 65 of the present judgment, the general principle of the prohibition of abuse of rights applies with regard to the reimbursement of expenses incurred by voluntary associations.

72 Consequently, the answer to the second question is that, where a Member State allows public authorities to make direct use of voluntary associations to carry out certain tasks, a public authority that intends to conclude contracts with such associations is not required, under EU law, to compare the proposals of various associations beforehand.

*The third question*

73 By its third question, based on the assumption that Directive 2004/18 is not applicable to a contract such as that at issue in the main proceedings, the referring court essentially asks whether, where a Member State, which allows public authorities to make direct use of voluntary associations to carry out certain tasks, in accordance with the conditions laid down in that regard by EU law, authorises those associations to engage in certain commercial activities, that Member State must establish, in that regard, precise limits, expressed as a percentage of the activity or resources of those associations.

74 At the outset, with regard to the principle of a non-profit organisation engaging in an activity on the market, it follows from paragraph 48 of the judgment in CoNISMa (C-305/08, EU:C:2009:807) that that question falls within the competence of a national legislature.

75 Furthermore, in accordance with paragraph 61 of the judgment in *Azienda sanitaria locale No 5 'Spezzino' and Others* (C-113/13, EU:C:2014:2440) and paragraph 64 of the present judgment, the activities of voluntary associations must strictly comply with the requirements laid down by national law that are applicable to them. Thus, the Court found that, within the limits set by that judgment, the regulatory framework of the activities of those associations falls within the competence of Member States.

76 Consequently, it is for the national legislature which, while allowing public authorities to use voluntary associations to carry out certain tasks, opted to allow those associations to pursue a commercial activity on the market, to decide whether it is preferable to regulate that activity by establishing a numerical limit or by otherwise defining that activity.

77 Observing the limits set out in paragraphs 60 to 62 of the judgment in *Azienda sanitaria locale No 5 'Spezzino' and Others* (C-113/13, EU:C:2014:2440), noted in paragraphs 63 to 65 of the present judgment, however, fundamentally entails respecting the very nature of those voluntary associations.

78 It follows that any commercial activity carried out by such associations on the market must be marginal and support the pursuit of their voluntary activity.

79 Consequently, the answer to the third question is that, where a Member State, which allows public authorities to make direct use of voluntary associations to carry out certain tasks, authorises those associations to engage in certain commercial activities, that Member State must establish the limits within which those activities may be carried out. Those limits must nevertheless ensure that those commercial activities are marginal, having regard to all the activities of such associations, and must support the pursuit of their voluntary activity.

**Costs**

80 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fifth Chamber) hereby rules:

1. **Articles 49 TFEU and 56 TFEU must be interpreted as meaning that they do not preclude national legislation, such as that at issue in the main proceedings, which allows local authorities to entrust the provision of medical transport services by direct award, without any form of advertising, to voluntary associations, provided that the legal and contractual framework in which the activity of those associations is carried out actually contributes to the social purpose and the pursuit of the objectives of the good of the community and budgetary efficiency.**

2. **Where a Member State allows public authorities to make direct use of voluntary associations to carry out certain tasks, a public authority which intends to conclude contracts with such associations is not required, under EU law, to compare the proposals of various associations beforehand.**

3. **Where a Member State, which allows public authorities to make direct use of voluntary associations to carry out certain tasks, authorises those associations to engage in certain commercial activities, that Member State must establish the limits within which those activities may be carried out. Those limits must nevertheless ensure that those commercial activities are marginal, having regard to all the activities of such associations, and must support the pursuit of their voluntary activity.**

[Signatures]

---

* Language of the case: Italian.