

# Public Procurement—requirement for home state qualifications was impermissible (Riigi Tugiteenuste Keskus)

This analysis was first published on Lexis®PSL on 1 June 2021 and can be found [here](#)

**Public Law analysis:** In two procurements for contracts relating to foodstuffs, Estonia had introduced a requirement that tenderers have various Estonian qualifications/authorisations, without regard to equivalent qualifications in the tenderers' own Member State. The provisions of Regulation (EC) No 852/2004 on the hygiene of foodstuff (the Food Regulation) imposed various technical requirements on the performance of the contracts. The case concerned the interpretation of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the co-ordination of procedures for the award of public works contracts, public supply contracts and public service contracts (the 2004 EU Directive). In a preliminary ruling the Court of Justice held that Article 46 must be interpreted as precluding national legislation under which the contracting authority must require that tenderers furnish proof that they hold the registration certificate or approval and that it be issued by the competent authority of the Member State in which the contract is to be performed (Estonia), even where they already hold a similar registration certificate or approval in the Member State in which they are established. Written by Jonathan Lewis, barrister at Henderson Chambers.

*Riigi Tugiteenuste Keskus (Public supply contracts—Project financed by the Fund for European Aid to the Most Disadvantaged—Criteria for the selection of tenderers—Judgment EUECJ C-6/20, EU:C:2021:402*

## What are the practical implications of this case?

The [Directive 2004/18/EC](#) of the European Parliament and of the Council of 31 March 2004 was repealed with effect from 18 April 2016 by [Directive 2014/24/EU](#). Further, the transitional period ended on 31 January 2021, with the UK having left the EU on that date. However, this decision remains of some relevance to UK practitioners and those who continue to advise in the EU. It reinforces the fairly well-established principles that a contracting authority generally may not require tenderers to have approvals/qualifications from its own state when tenderers may have suitable equivalent qualifications from their home states.

## What was the background?

In 2015 and then in 2017, the Estonian Ministry of Social Affairs ran procurements for contracts for the purchase of food aid for disadvantaged people. The performance of the contracts required the tenderer to use an intermediate warehouse in which foodstuffs could be stored or an Estonian transport solution.

In the 2015 procurement, tenderers were initially required to have the approval of the Estonian Veterinary and Food Office. However, during the procurement procedure, the tender documentation was amended in order to replace that requirement with the obligation to provide confirmation of compliance with the Food Regulation. The 2017 procurement proceeded on that amended basis. Framework agreements were signed with the three successful tenderers.

In 2018, Riigi Tugiteenuste Keskus (the shared services centre for the state) rejected requests for payment in connection with the food aid programme on the basis that the requirement that tenderers must have an approval issued by an Estonian authority etc was unjustifiably restrictive for tenderers established in other Member States.

## What did the court decide?

Article 46 of the 2004 EU Directive dealt with the 'Suitability to pursue the professional activity'. In essence it provided that tenderers may be asked to prove their enrolment in their own Member State by way of one of the professional or trade registers, or, alternately, to provide a declaration on oath or a certificate as prescribed. It further provided that the contracting authority may require the tenderer to furnish proof that they possess a particular authorisation/membership.

The Court of Justice held that the obligation for tenderers to hold a registration certificate/approval is a qualitative selection criterion, not a condition for the performance of the contract (at para [44]). This is for two reasons:

- first, that requirement corresponds to the option given to the contracting authority under Article 46 to ask an economic operator to prove its suitability to pursue the professional activity concerned by a public procurement procedure
- second, the obligation for an economic operator to register or obtain approval in the Member State in which the contract is to be performed presupposes that the successful tenderer will be required to have an establishment in that state. Conversely, it does not provide any information as to the manner in which that contract is to be performed. Therefore, the requirement to hold a registration certificate/approval cannot be regarded as a special condition concerning the performance of that contract

In finding that Article 46 precluded a contracting authority from requiring, as a criterion for qualitative selection of tenderers, tenderers to hold a registration certificate and/or approval in the Member State in which the contract is to be performed when a tenderer already had a registration certificate and/or approval in the Member State in which it is established, the Court of Justice reasoned as follows.

First, it noted that the principle of mutual recognition of qualifications prevails at the stage of the selection of tenderers (referring to recital 42) and noted that Article 46 itself allows for tenderers to rely upon authorisations/membership in their home countries (at para [48]).

Second, the Court of Justice further justified its interpretation of Article 46 by explaining how it was supported by other provisions of the 2004 EU Directive. For example, Article 48(2)(d) and (2)(j)(ii) refer to a number of situations in which an economic operator may demonstrate its technical and/or professional abilities by providing documents issued by their home competent authorities (at para [50]). The same applies to Article 49 as regards compliance with quality assurance standards. Article 52(3) allows certified registration on official lists by home competent bodies to constitute a presumption of suitability (at para [51]). It was apparent from Article 52(4) that information which may be deduced from registration on official lists or certification may not be questioned without justification (at para [51]). Article 52(5) requires that the contracting authorities must recognise equivalent certificates from bodies established in other Member States.

Thirdly, the Court of Justice noted that infringement of Article 46 necessarily entails infringement of the principles of proportionality and equal treatment of tenderers since the requirement that tenderers must have the approval of an Estonian authority or must fulfil obligations relating to information and authorisation in Estonia is discriminatory and did not appear to be justified (at para [52]). It found that there was nothing to suggest that contracts could not be performed from the Member State in which tenderers were established (at para [53]). It was therefore for the tenderer to decide, on the basis of economic calculations, whether it wanted to take on an establishment in Estonia (at para [53]).

The Court of Justice reminded itself that to allow a Member State to make the provision of services by an operator from another Member State subject to the possession of a local business licence would deprive Article 56 of the Treaty of the Functioning of the EU of all effectiveness as that article's purpose is precisely to abolish restrictions on the freedom to provide services (at para [54]). Hence, Article 46 of the 2004 Directive must be interpreted as precluding a contracting authority from requiring, as a qualitative selection criterion, a registration certificate and/or approval in the Member State of performance of public contracts where the tenderer already has similar approval in the Member State in which it is established (at para [55]).

The Court of Justice considered the provisions of the Food Regulation to determine whether its interpretation of Article 46 of the 2004 Directive conflicted with the requirements of the Food Regulation (at paras [56]–[62]). It concluded that a food business operator that has an establishment in a Member State other than Estonia which is registered or approved in that state may deliver foodstuffs in Estonia without having to obtain a special additional authorisation (at para [64]).

#### Case details

- Court: Court of Justice of the EU (fourth chamber)
- Judges: M Vilaras, President of the Chamber, N Piçarra, D Šváby (Rapporteur), S Rodin and K Jürimäe
- Date of judgment: 20 May 2021

Jonathan Lewis is a barrister at Henderson Chambers, and a member of LexisPSL's Case Analysis Expert Panels. If you have any questions about membership of these panels, please contact [caseanalysiscommissioning@lexisnexis.co.uk](mailto:caseanalysiscommissioning@lexisnexis.co.uk).

Want to read more? Sign up for a free trial below.

**FREE TRIAL**