Limiting participation in procurement procedures (Parsec Fondazione)

18/06/2020

Public Law analysis: In a preliminary ruling, the Court of Justice held that Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement prevented Italy from legislating so as to prevent a non-profit-making entity from participating in a procurement for engineering and architectural services where that entity was entitled and qualified under national law to provide the services in question. Written by Jonathan Lewis, barrister, at Henderson Chambers.

Parsec Fondazione, Case C-219/19

What are the practical implications of this case?

Italian procurement legislation governing engineering and architectural services excluded the involvement of non-profit organisations. Relying on a close reading of Directive 2014/24/EU and its earlier case law, the Court of Justice found that this exclusion ran counter to the Directive, which establishes a broad definition of 'economic operators'. This decision makes it plain that it will be very difficult (if not impossible) for Member States to narrow the kinds of economic operators that may participate in public procurements (even in highly specialised sectors). Any attempted justifications for such an exclusion will be subjected to close scrutiny.

What was the background?

Parsec is a non-profit-making private law foundation involved in the study of natural disasters and other environmental matters. It created a seismology observatory and managed a network of stations for measuring seismic activity. It sought to take part in the Italian Ministry of Infrastructure and Transport's procurement of a service classifying territory according to seismic risk.

However, the Italian National Anti-Corruption Authority had rejected Parsec's application for inclusion in the national register of engineering firms and firms of professionals entitled to provide architectural and engineering services. The basis of this rejection was that Parsec did not fall within any of the categories of economic operators referred to in the Italian Public Procurement Code (the Code) (not reported by LexisNexis® UK). The Code established a special regime for architectural and engineering services and limited which entities could participate in procurement procedures under that regime such that non-profit-making bodies did not qualify.

This exclusion of non-profit entities was said to be justified by the significant degree of professionalism required of the tenderers to guarantee the quality of the services they would have to provide and by a presumption that the persons providing those services on a continuous professional basis, subject to remuneration, are more likely to have performed their activity without interruption and to have undergone professional development training.

What did the court decide?

The court's decision was driven by three provisions of Directive 2014/24/EU—recital 14, Article 19(1) and Article 80(2). Recital 14 of Directive 2014/24/EU makes it clear that the notion of 'economic operators' should be interpreted in a broad manner and should cover appropriate entities 'irrespective of the legal form under which they have chosen to operate'. The definition of 'economic operator' in Article 2(1) of Directive 2014/24/EU is equally broad.

Article 19(1) of Directive 2014/24/EU provides that economic operators that are entitled under national law to provide the relevant service shall not be rejected solely on the ground that, under the law of the Member State in which the contract is awarded, they would be required to be either natural or legal persons. Article 19 of Directive 2014/24/EU does however go on to explain that operators may be required to indicate the names and relevant professional qualifications of the staff to be responsible for the performance of the contract in question.

Article 80 of Directive 2014/24/EU deals with rules on the organisation of design contests and the selection of participants. Article 80(2)(b) of Directive 2014/24/EU provides that participants to design

contests shall not be limited on the grounds that, under the law of the Member State in which the contest is organised, they would be required to be either natural or legal persons.

The Court of Justice (at para [20]) relied upon its decision in *CoNISMa,* Case C-305/08 (in relation to the predecessor of the Directive) where it had held that Italian legislation that prohibited entities which were primarily non-profit-making from taking part in a procurement procedure (even though qualified to provide the services) was incompatible with EU law. In *CoNISMa*, it was held that Member States do have a discretion as to whether or not to allow certain categories of economic operators to provide certain services. However, if and to the extent that such entities are entitled to offer those services, national law cannot prohibit them from taking part in procurement procedures.

The Court of Justice rejected the justification for the exclusion advanced by Italy (at para [24]) for three reasons:

- there was no evidence of any specific correlation between professionalism/quality and the legal form of the economic operator (at para [25])
- the presumption is incompatible with EU law (at para [26])
- the EU legislature appreciated the importance of tenderers presenting a high degree of professionalism (Article 19(1) of Directive 2014/24/EU allows contracting authorities to ask for professional qualifications of staff etc), but did not introduce a different treatment on account of the legal form under which such tenderers have chosen to operate

Case details

- Court: Court of Justice (Tenth Chamber)
- Judges: I Jarukaitis, E Juhász, M Ilešič, P Pikamäe
- Date of judgment: 11 June 2020

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