

The Requirement to Obtain Consent from the Relevant Authorities Constitutes a Contract Performance Condition

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Annotation on the Judgment of the Court of Justice of the European Union (Ninth Chamber) of 8 July 2021 in Case C-295/20 Sanresa UAB v Aplinkos apsaugos departamentas prie Aplinkos ministerijos

In July 2021, the Court of Justice of the European Union delivered its judgment on Case C-295/20. The judgment established that the requirement to obtain authorisation for international shipment of waste under Regulation 1013/2006 is a contract performance condition therefore a contracting authority cannot exclude a tenderer due to the lack thereof at the time of tender submission.

I. Introduction

On 8 July 2021, the Court of Justice of the European Union ('the Court') delivered its judgment concerning the interpretation of Articles 18, 58 and 70 of the Directive 2014/24/EU ('the Directive')¹ following the questions referred by the *Lietuvos Aukščiausiasis Teismas* ('the Supreme Court of Lithuania'). In the proceedings before the national courts, Sanresa UAB ('Sanresa') was seeking the annulment of the decision of *Aplinkos apsaugos departamentas prie Aplinkos ministerijos* ('the Environmental Protection Department under the Ministry of Environment, Lithuania', or 'the Department') to reject its tender

on the grounds that it had failed to demonstrate it possesses the right to carry out the subject matter of the public contract.

II. Background to the Dispute

The Environmental Protection Department of the Lithuanian Ministry of Environment published a call for tender for hazardous waste management services in October 2018. Pursuant to Regulation 1012/2006 ('the Regulation')², the shipment of waste from one member state to another entails consent from the relevant authorities. The necessary notification and movement documents to be submitted in order to obtain the consent under the Regulation require information regarding the intended quality and physical characteristics of the waste as well as the intended period of time of the shipment.³

The tender documents published by the Department did not make explicit reference to the Regulation but 'the right to pursue the activity' was provided as a requirement for qualification.⁴ The Department asked tenderers to meet the capacity requirements under the selection criteria at the date of the tender submission but set forth that only the successful tenderer would be asked to provide the necessary documents showing the required capacity. The scope of the waste to be removed under the contract was not precisely specified and the tenderers could not

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1 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 [2014] OJ L 94/65.

2 Regulation 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipment of waste [2006] OJ L 190/1.

3 Art 4, Annex IA and IB of the Regulation 1013/2006.

4 Translation of the summary of the request for a preliminary ruling pursuant to art 98(1), para 2 of the Rules of Procedure of the Court of Justice.

visit the facility where the waste was stored. Consequently, the total amount of waste subject to the contract was not known at the time of publication of the call for tender.

The tender submitted by Sanresa, acting jointly with two other entities, was one of the four tenders received by the Department. Sanresa's tender designated two sub-contractors who were not from Lithuania but rather from different Member States. As a result of Sanresa's decision to carry out the service with sub-contractors, which characterised the service as international shipment of waste, Sanresa was asked by the Department to provide the authorisation required under the Regulation since the designated sub-contractors lacked the required authorisation. It is important to note that in the meantime the contracting authority decided to terminate the procedure which was later reversed; however, the reasons for this are unknown. Following an opportunity given to Sanresa to provide the required authorisation or to change its sub-contractors, Sanresa's tender was rejected on the basis that it failed to show its right to pursue the subject matter of the contract. The Department awarded the contract to the successful tenderer.

Sanresa, being of the opinion that the requirement of authorisation did not concern the supplier capacity but the performance of the contract, made a complaint to the Department on the basis that the tender documents did not include international shipment authorisation. Sanresa argued, even if there were a reference to the Regulation, it still would not be possible to obtain the required consent because the scope of the waste was not known.⁵ The application was dismissed by the Department. After being rejected also in the first instance and appeal courts, the dispute was brought before the Supreme Court of Lithuania, which referred it to the Court of Justice.

III. Judgment of the Court

The questions received were aimed at clarifying whether the authorisation required by the contracting authority was a selection criterion regarding suitability to pursue the professional activity or a contract performance condition. Based on the answer given to this question the referring court inquired when can a contracting authority check and exclude

a tenderer for lack of authorisation concerning the final date of submissions.

In answering the first question, the Court assessed whether the requirement arising from Regulation 1012/2006 to obtain authorisation can be considered (i) suitability to pursue the professional activity, (ii) economic and financial standing or (iii) technical and professional ability under Article 58(1) of the Directive 2014/24.⁶ Briefly referring what suitability to pursue the professional activity is under Article 58(2), the Court arrived at the conclusion that the consent required for waste shipment from a Member State to another 'cannot be equated' either with the obligation to be enrolled in a register or obligation to possess authorisation.⁷ After eliminating the categorisation of such consent also as economic and financial standing, it asserted that the criterion of technical and professional ability concerns the experience of an undertaking; therefore the obligation to obtain consent cannot be proof of technical and professional ability either.⁸

The Court came to the conclusion that since the obligation to obtain consent for shipment *relates* to the performance of the contract it should be a contract performance condition.⁹ This was because such requirement aims to put forth environmental considerations that apply to the export of waste which can only be required from the tenderer who prefers to export waste.¹⁰ After referring to Article 18(2) regarding the compliance with environmental law of the Union in the performance of public contracts, the Court answered to the argument that it is likely to receive regarding the problem that may arise in case of failure to obtain the necessary consent. The suggestion given was that a contracting authority wishing to avoid such a problem might avail itself the opportunity to add selection criteria based on previous experience.¹¹

In answering to the question whether failure to submit proof of compliance with a contract perfor-

⁵ *Ibid*, para 8.

⁶ Case C-295/20 *Sanresa UAB v Aplinkos apsaugos departamentas prie Aplinkos ministerijos* [2021] ECLI:EU:C:2021:556, para 41.

⁷ *Ibid*, para 44.

⁸ *Ibid*, paras 46-50.

⁹ *Ibid*, paras 51-52.

¹⁰ *Ibid*.

¹¹ *Ibid*, paras 53-54.

mance condition can be a reason to exclude a tenderer, the Court recalled that contracting authority did not provide the exact amount of waste that is subject to the public contract in question and there was no express reference to the obligation to obtain consent for the shipment in the tender documents.¹² Though the Department should have included the required conditions in the tender document, lack thereof did not preclude the requirement from being a contract performance condition since it arose from the Union law and the shipment of waste from Lithuania was *Sanresa's* decision.¹³ The Court emphasized while compliance with the selection criteria is assessed at the time of submission of tender, compliance with contract performance clause can be checked only after the contract was awarded.¹⁴ Consequently obliging tenderers to satisfy contract performance condition from the outset was deemed excessive and in breach of the principles of proportionality and transparency.

IV. Commentary

It is apparent that the Commission's arguments regarding the interplay between selection criteria and

contract performance conditions were at the end successful.¹⁵ Prior to this case, the Commission was persistent in arguing that a requirement relating to capacity and suitability is selection criterion if it concerns the situation at the time of award but it is a condition for contract performance if it concerns the standing during the performance.¹⁶ Dismissing Commission's arguments in these cases, the Court was apt to express the fact that the capacity or suitability of the tenderer is inherently *relates* to the proper performance of the contract does not mean it is a condition for performance since such requirement does not say anything about how the contract is to be performed.¹⁷ To the contrary, in this case the fact that the requirement to obtain authorisation 'relates to the performance of the contract' was enough of a reason to conclude that it was a contract performance condition.¹⁸

Going back to the Court's reasoning, under Article 58 of the Directive, selection criteria envisage suitability to pursue the professional activity or economic and financial standing or technical and professional ability. Provided that it falls under one of the three categories, the contracting authority can set the professional ability expected from the tenderers.¹⁹ Therefore it is not clear why the requirement cannot be suitability to pursue professional activity just because it 'cannot be equated either with the obligation to be enrolled in a professional or trade register or to the obligation to possess a particular authorisation or to be a member of a particular organisation'.²⁰ The difference between the requirement of authorisation that could be required under Article 58(2) and the consent required for shipment of waste is not further justified. Article 58(2) merely states what contracting authorities can ask but does not provide a limit in itself.²¹

The conclusion that the authorisation requirement cannot be a selection criterion is not as apparent as it is repeatedly asserted in the judgment. Though rendered under the previous Directive, it was concluded less than 20 days before this judgment that the registration or approval requirement arising from Union law was a selection criterion and not a contract performance condition.²² In my opinion, the authorisation requirement arising from the Union law can be a lawful selection criterion however the specific requirement in the case was unlawful due to the drafting of tender documents. The principles of equal treatment and transparency require tender

¹² *Ibid*, para 59.

¹³ *Ibid*, para 60.

¹⁴ *Ibid*, para 62.

¹⁵ For the cases the arguments on the matter were not accepted see Case C-234/14 *Ostas celtnieks SIA v Talsu novada pašvaldība and Jēpīrkumu uzraudzības birojs* [2016] ECLI:EU:C:2016:62, Case C-76/16 *INGSTEEL spol. sro and Metrostav as v Úrad pre verejnú obstarávanie* [2017] ECLI:EU:C:2017:549, and Case C-6/20 *Sotsiaalministeerium v Riigi Tugiteenuste Keskus. Request for a preliminary ruling from the Tallinna Ringkonnakohus* [2021] ECLI:EU:C:2021:402.

¹⁶ To that effect see the Opinion of AG Sánchez-Bordona in Case C-76/16 *INGSTEEL* [2017] ECLI:EU:C:2017:226, para 28.

¹⁷ C-76/16 *INGSTEEL*, paras 35-39, C-6/20 *Sotsiaalministeerium v Riigi Tugiteenuste Keskus*, paras 44-46.

¹⁸ C-295/20 *Sanresa*, para 52.

¹⁹ Roxana Vornicu, 'Article 58 Selection Criteria' in Roberto Caranta and Albert Sanchez Graells (eds), *European Public Procurement Commentary on Directive 2014/24/EU* (Edward Elgar Publishing 2021) 638.

²⁰ Case C-295/20 *Sanresa*, para 44.

²¹ Joined Cases C-27-29/86 *SA Constructions et entreprises industrielles (CEI) and others v Société coopérative 'Association intercommunale pour les autoroutes des Ardennes' and others* [1987] ECLI:EU:C:1987:355, para 13-17. See also Albert Sánchez Graells, *Public Procurement and the EU Competition Rules* (2nd edn, Hart Publishing 2015) 302.

²² C-6/20 *Sotsiaalministeerium v Riigi Tugiteenuste Keskus*, para 44.

documents to be clear, precise and unequivocal.²³ The failure on the Department's side to observe these principles was to the detriment of the procedure. Accordingly, the Court should have concluded that setting such requirement without the necessary publication is a criterion that was not authorised by the Directive instead of further carrying out its assessment under Article 70.²⁴

Having concluded that the compliance with the requirement cannot be checked before the contract is awarded; the Court shifted its focus to contract performance. The Court held since the requirement falls under Article 18(2) it was a contract performance condition.²⁵ However the obligations provided under Article 18(2) can be taken into consideration in the selection of economic operators.²⁶ This conclusion can also be derived from the explicit reference made in Article 56 allowing contracting authorities to not to award a contract if the tender is not in compliance with Article 18(2). This confirms that compliance with the obligations in the fields of Union environmental law can rightfully be checked before the contract award decision.

Article 70 provides underlying concerns without giving a definition or specific examples, therefore it is considerably permissive. Contract performance conditions may specify policies that are not a part of the legal obligations of the tenderer or they can reiterate the existing obligations to ensure compliance.²⁷ However it is not easy to comprehend how a legal requirement directly arising from the Union law to legally perform the service is a special condition despite not being referred to in the tender documents. Even from the first case where the Court established contracting authorities may lay down additional conditions concerning the performance, the prior publication was a prerequisite for the lawfulness of such conditions, which is now an element of Article 70.²⁸ Following this judgment, it could be argued every piece of applicable Union law has the status of the contract performance condition which is puzzling considering the aim of the provision.

Since under the tender documents the Department did not have grounds to exclude *Sanresa*, the Court concluded the requirement of consent at the case can only be a condition for contract performance. Instead of establishing the requirement as a contract performance condition, an analysis of the deficiencies in the tender documents, which were probably the reason why the procedure was terminated after asking

Sanresa's authorisation, would have allowed more concrete reasoning why *Sanresa* should not have been excluded.

V. Concluding Remarks

In *Sanresa*, the Court established that the requirement of consent of relevant authorities for export of waste is a contract performance condition and does not give the contracting authority the right to exclude a tenderer because of failure to obtain it before the award of the contract. The doubt of imposing an excessive requirement during the competitive stage deferred the Court from focusing on the inefficiency of such approach might entail in case the successful tenderer fails to obtain the required consent. The fact that a condition is not a lawful selection criterion to exclude a tender is not convincing enough of a reason to conclude it is a condition for performance.

Many other elements were open to criticism such as the fact that the obligation required to carry out the service was not explicitly referred at the tender documents and the specifications were not precise enough for an undertaking wishing to export waste to obtain necessary consent. The Court, instead of referring to these errors and the significance of obtaining the consent before the contract is awarded, has decided that compliance with such a requirement should be verified after the awarding of the contract.

23 Joined Cases 226/04 and 228/04 *La Cascina Soc. coop. arl and Zilch Srl v Ministero della Difesa and Others (C-226/04) and Consorzio G. f. M. v Ministero della Difesa and La Cascina Soc. coop. arl* [2006] ECLI:EU:C:2006:94, para 32, Case C-27/15 *Pippo Pizzo v CRGT Srl* [2016] ECLI:EU:C:2016:404, para 36, Case C-42/13 *Cartiera dell'Adda SpA v CEM Ambiente SpA* [2014] ECLI:EU:C:2014:2345, para 44, referring to C-27/15 *Pippo Pizzo*, para 36.

24 Similar to the Case C-368/10 where the Court provided that 'criteria of sustainability of purchases and socially responsible business' is a minimum level of technical ability the use of which is not authorised by the Directive (Case C-368/10 *Commission v Netherlands* [2012] ECLI:EU:C:2012:284, para 108).

25 C-295/20 *Sanresa*, para 53.

26 Roberto Caranta, 'The Changes to the Public Contract Directives and the Story They Tell about How EU Law Works' (2015) 52 *Common Market Law Review* 391. See also recital 40 of the Directive 2014/24.

27 Marta Andhov, 'Article 70 Conditions for Performance of Contracts' in Caranta and Sanchez Graells (n 19) 751.

28 Case C-31/87 *Beentjes v State of the Netherlands* [1988] ECLI:EU:C:1988:422.

Though the Court admitted that there is a possibility that the successful tenderer might not be able to obtain the necessary consent, the solution proposed

regarding past experience was not suitable to protect the contracting authority from the risk of failure to obtain specific consent.