



Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

7 June 2012*

(Directive 2004/18/EC — Public contracts in the field of defence — Article 10 — Article 296(1)(b) EC — Protection of a Member State's essential security interests — Trade in arms, munitions and war material — Product procured by a contracting authority specifically for military purposes — Existence, as regards that product, of a potential and largely identical civilian application — Tilttable turntable for carrying out electromagnetic measurements — Contract not put out to tender in accordance with the procedures provided for by Directive 2004/18)

In Case C-615/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Korkein hallinto-oikeus (Finland), made by decision of 13 December 2010, received at the Court on 23 December 2010, in the proceedings brought by

Insinööritoimisto InsTiimi Oy,

party heard in the matter:

Puolustusvoimat,

THE COURT (Fourth Chamber),

composed of J.-C. Bonichot, President of the Chamber, A. Prechal, L. Bay Larsen (Rapporteur), C. Toader and E. Jarašiūnas, Judges,

Advocate General: J. Kokott,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 12 December 2011,

after considering the observations submitted on behalf of:

- Insinööritoimisto InsTiimi Oy, by A.-M. Eskola, asianajaja, and T. Pekkala,
- the Puolustusvoimat, by J. Matinlassi, acting as Agent,
- the Finnish Government, by J. Heliskoski, acting as Agent,
- the Czech Government, by J. Očková, T. Müller and M. Smolek, acting as Agents,
- the Portuguese Government, by L. Inez Fernandes, acting as Agent,

* Language of the case: Finnish.

— the European Commission, by E. Paasivirta and C. Zadra, acting as Agents,
after hearing the Opinion of the Advocate General at the sitting on 19 January 2012,
gives the following

Judgment

- 1 This reference for a preliminary ruling concerns the interpretation of Article 10 of 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), of Article 346(1)(b) TFEU and the list of arms, munitions and war material included in Council Decision 255/58 of 15 April 1958 ('the Council list of 15 April 1958') to which that provision of the TFEU applies.
- 2 The reference has been made in a dispute between Insinööritoimisto InsTiimi Oy (Engineering firm InsTiimi SA; 'InsTiimi') and the Suomen Puolustusvoimien Teknillinen Tutkimuslaitos (the Finnish Defence Forces Technical Research Centre) concerning the award by the latter, following a procedure differing from those provided for in Directive 2004/18, of a contract for the supply of tiltable turntable equipment intended to be used to support objects being subjected to electromagnetic measurements.

Legal context

European Union ('EU') law

- 3 Article 10 of Directive 2004/18, entitled 'Defence procurement' and included in Chapter II (entitled 'Scope') of Title II of that directive, provides:

'This Directive shall apply to public contracts awarded by contracting authorities in the field of defence, subject to Article 296 of the [EC] Treaty.'
- 4 Article 296 EC, which was applicable at the time of the facts in the main proceedings and was replaced, in the same terms, by Article 346 TFEU following the entry into force of the Treaty of Lisbon on 1 December 2009, stated:

'1. The provisions of ... [the EC] Treaty shall not preclude the application of the following rules:

(a) no Member State shall be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security;

(b) any Member State may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material; such measures shall not adversely affect the conditions of competition in the common market regarding products which are not intended for specifically military purposes.

2. The Council may, acting unanimously on a proposal from the Commission, make changes to the list, which it drew up on 15 April 1958, of the products to which the provisions of paragraph 1(b) apply.'
- 5 Council Decision 255/58 of 15 April 1958 established the list referred to in Article 296(2) EC, extracts of which are reproduced in Council document 14538/4/08 of 26 November 2008. The referring court refers to that list, in particular to points 11, 14 and 15 thereof, which read as follows:

'The provisions of Article [296](1)(b) of the [EC] Treaty are applicable to the war material, including nuclear arms, listed below:

...

11. Military electronic equipment.

...

14. Specialised parts and items of material included in this list insofar as they are of a military nature.

15. Machines, equipment and items exclusively designed for the study, manufacture, testing and control of arms, ammunitions and equipment of an exclusively military nature included in this list.'

- 6 Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC (OJ 2009 L 216, p. 76), which the Member States were required to implement before 21 August 2011, provides as follows in recital 10 in its preamble:

'For the purposes of this Directive, military equipment should be understood in particular as the product types included in the list of arms, munitions and war material adopted by the Council in its [list] ... of 15 April 1958 This list includes only equipment which is designed, developed and produced for specifically military purposes. ... For the purposes of this Directive, military equipment should also cover products which, although initially designed for civilian use, are later adapted to military purposes to be used as arms, munitions or war material'.

Finnish law

- 7 Directive 2004/18 was transposed into Finnish law by Law No 348/2007 on public procurement (julkisista hankinnoista annettu laki) and by Decree No 614/2007 on public procurement (julkisista hankinnoista annettu asetus).

- 8 Paragraph 7(1) of that Law defines its scope as follows:

'This Law shall not apply to contracts

(1) where they are to be kept confidential, where their performance must be accompanied by special security measures laid down by law, or where the essential security interests of the State so require;

(2) where their object is suited primarily to military purposes ...

...'

- 9 It is apparent from an administrative instruction issued by the Finnish Ministry of Defence on 28 May 2008 that, provisionally, public procurement contracts for military equipment intended for defence must comply with, inter alia, Order No 76/1995 issued by the Ministry of Defence on 17 March 1995.

- 10 Paragraph 1 of Order No 76/1995 defines products or services intended essentially for military purposes, to which Law No 348/2007 on public procurement is not applicable.

- 11 It is apparent from Paragraph 1 of, in conjunction with point M of the annex to, Order No 76/1995 that, essentially, this relates to 'specialised equipment for military activities, training or military situation simulation drills, and [the] components, additional apparatus and equipment specially designed for these'.

The dispute in the main proceedings and the question referred

- 12 In the course of 2008, the Suomen Puolustusvoimien Teknillinen Tutkimuslaitos issued a call for tenders for tiltable turntable equipment to a value of EUR 1 650 000 without prior publication of a contract notice in the *Official Journal of the European Union*.
- 13 On 5 February 2008 it invited four economic operators, including InsTiimi, to submit tenders to it.
- 14 On 24 June 2008, pursuant to a ‘negotiated procedure’ which did not satisfy the requirements of one of the procurement procedures referred to in Directive 2004/18, the contract was awarded to a tenderer other than InsTiimi. On 25 June 2008, the subject-matter of the contract and the operation of the tiltable turntable equipment at issue in the main proceedings were described in a Finnish national daily newspaper.
- 15 As it took the view that the procedure ought to have complied with the rules set out in Directive 2004/18, InsTiimi brought an action before the Markkinaoikeus (Market Court) challenging the decision to award the contract at issue in the main proceedings.
- 16 The Markkinaoikeus dismissed the action since it regarded it as settled that that tiltable turntable equipment was suited primarily to military purposes and that the contracting authority intended to use it solely for such purposes.
- 17 The Markkinaoikeus accordingly concluded that that contract came under the exception provided for in Paragraph 7(1)(2) of Law No 348/2007 on public procurement.
- 18 InsTiimi appealed against that decision to the Korkein hallinto-oikeus (Supreme Administrative Court).
- 19 Before that court, InsTiimi submitted that the tiltable turntable constitutes a technical innovation from the civilian sector and is not war material. The technical implementation of the tiltable turntable equipment at issue in the main proceedings is, it contended, based on a combination of freely available materials, components and assembly systems, and its design is solely a matter of the appropriate selection and attachment of structural components in order to fulfil the requirements of the invitation to tender.
- 20 The Puolustusvoimat (Defence Forces), represented by the Pääesikunta (General Staff), contended before the referring court that that tiltable turntable equipment had been purchased for specifically military purposes and was intended, in particular, for the purposes of simulating combat situations. The tiltable turntable, it was argued, is used to simulate and practise military countermeasures against aerial reconnaissance from a variety of angles and target ‘acquisition’.
- 21 According to the argument put forward by the Puolustusvoimat, that tiltable turntable equipment is the essential component of an open-space measurement track, intended for electronic warfare measurements, simulations and drills, and it is consequently designed for the study of weapons intended for military use.
- 22 That same tiltable turntable equipment, it is argued, is a product within the meaning of point M of the annex to Order No 76/1995.
- 23 The referring court expresses uncertainty as to whether Directive 2004/18 applies in the case where the material which forms the subject-matter of the contract has a specifically military purpose but where there are also technical applications of that material in the civilian sector that are fundamentally similar.

- 24 Against that background, the Korkein hallinto-oikeus decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

‘Is Directive [2004/18] applicable, having regard to Article 10 of that directive and to Article [296](1)(b) [EC] and to the list ... of the Council [of] 15 April 1958, to a procurement which otherwise falls within the scope of the directive, when according to the contracting entity the intended purpose of the object of procurement is specifically military, but there also exist largely identical technical applications of the object of procurement in the civilian market?’

Admissibility of the question referred

- 25 While not raising an objection of inadmissibility, the Finnish Government states, in its written observations, that the reference for a preliminary ruling does not contain information with regard to the measures which the contracting authority considers necessary for ‘the protection of the essential interests of [the] security’ of the Republic of Finland, within the terms of Article 296(1)(b) EC, this being the reason why it took the view that it was unable to rule on that condition for the application of that provision.
- 26 In that regard, it is necessary to state that the fact that the referring court does not seek an interpretation of that condition for the application of Article 296(1)(b) EC is not, of itself, such as to call into question the admissibility of that reference.
- 27 In the context of the procedure laid down in Article 267 TFEU, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of European Union law, the Court is in principle bound to give a ruling (see, *inter alia*, Case C-571/10 *Kamberaj* [2012] ECR, paragraph 40 and the case-law cited).
- 28 However, the Court must examine the circumstances in which cases are referred to it by the national court in order to assess whether it has jurisdiction (see *Kamberaj*, paragraph 41). The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see Case C-450/06 *Varec* [2008] I-581, paragraph 24).
- 29 In that regard, it is necessary to note that the question raised in the present case could be regarded as hypothetical and, consequently, as inadmissible only if it appeared clearly that, in the case in the main proceedings, the application of the derogation provided for in Article 296(1)(b) EC, to which Article 10 of Directive 2004/18 refers, could not, in any case, be justified by the Republic of Finland’s essential security interests.
- 30 In the order for reference, without definitively indicating that, in this case, the contracting authority claimed such essential interests, the Korkein hallinto-oikeus restricts itself to stating that the Puolustusvoimat did not specify, in the manner advocated by the Commission in the interpretative communication on the application of Article 296 EC in the field of defence procurement (COM(2006) 779 final) of 7 December 2006, the essential security interests which were affected by the acquisition of the tiltable turntable equipment at issue in the main proceedings or the reasons why it was necessary not to apply the rules set out in Directive 2004/18 in this specific case.
- 31 In those circumstances, it is not obvious that the question referred is hypothetical in nature.

32 The reference for a preliminary ruling must therefore be considered to be admissible.

The question referred for a preliminary ruling

- 33 By its question, the referring court asks, in essence, whether Article 10 of Directive 2004/18, read in conjunction with Article 296(1)(b) EC, must be interpreted as authorising a Member State to set aside the procedures laid down by that directive in the case of a public contract awarded by a contracting authority in the field of defence for the acquisition of material which, although intended for specifically military purposes, may also be used for largely identical civilian applications.
- 34 It follows from Article 10 of Directive 2004/18, read in conjunction with Article 296(1)(b) EC, that the Member States may, for contracts awarded in the field of defence, take measures derogating from that directive where, first, 'trade in arms, munitions and war material' is concerned and, second, those measures appear necessary for the 'protection of the essential interests' of the security of the Member State concerned.
- 35 In this respect, it should be borne in mind that those provisions must, in accordance with settled case-law in respect of derogations from fundamental freedoms, be interpreted strictly (see, *inter alia*, as regards the derogations provided for in Article 296 EC, Case C-284/05 *Commission v Finland* [2009] ECR I-11705, paragraph 46 and the case-law cited). Although Article 296(1)(b) EC refers to measures which a Member State may consider necessary for the protection of the essential interests of its security, that article cannot, however, be read in such a way as to confer on Member States a power to depart from the provisions of the EC Treaty based on no more than reliance on those interests (*Commission v Finland*, paragraph 47).
- 36 The types of products included in the Council list of 15 April 1958, to which Article 296(2) EC expressly refers, in principle come within the possibility of derogation provided for by Article 296(1)(b) EC.
- 37 It is for the referring court to determine whether a product such as the tiltable turntable equipment at issue in the main proceedings may be classified in one or other of the categories featuring in that list.
- 38 However, Article 296(1)(b) EC stipulates that measures which the Member States may thus take must not adversely affect the conditions of competition in the common market regarding products which are not intended for specifically military purposes.
- 39 Consequently, it is necessary, first, to bear in mind that a contracting authority cannot invoke Article 296(1)(b) EC to justify a derogating measure when purchasing material which is certainly for civilian use and possibly for military use (see, to that effect, Case C-337/05 *Commission v Italy* [2008] ECR I-2173, paragraphs 48 and 49).
- 40 Second, even if a product comes within one or other of the categories of materials included in the Council list of 15 April 1958, that product can, if it has technical applications for civilian use which are largely identical, be considered to be intended for specifically military purposes, within the terms of Article 296 EC, only if such use is not solely that which the contracting authority intends to confer on it but also, as the Advocate General has noted in point 48 of her Opinion, that which results from the intrinsic characteristics of a piece of equipment specially designed, developed or modified significantly for those purposes.
- 41 In this regard, it must, indeed, be noted that the word 'military' used in point 11 of that list and the words 'insofar as they are of a military nature' and 'exclusively designed' used respectively in points 14 and 15 of that list indicate that the products referred to in those points must, in objective terms, have a specifically military nature.

- 42 Finally, it is necessary to reiterate that, recently, in recital 10 in the preamble to Directive 2009/81, the EU legislature stated that the term ‘military equipment’, as used in that directive, should cover products which, although initially designed for civilian use, are later adapted to military purposes to be used as arms, munitions or war material.
- 43 Material such as the tiltable turntable equipment at issue in the main proceedings is deemed, according to the information provided to the Court, to facilitate the carrying-out of electromagnetic measurements and the simulation of combat situations. It could, therefore, be characterised as a component of military equipment for the testing and control of arms, within the meaning of point 15 of the Council list of 15 April 1958, read together with points 11 and 14 of that list, this being a matter for the referring court to determine.
- 44 However, such tiltable turntable equipment, which the contracting authority intends to use only for military purposes, can be considered to be intended specifically for such purposes, within the terms of Article 296(1)(b) EC, only if it is established that, unlike the similar material intended for civilian uses invoked by the applicant in the main proceedings, that equipment, by virtue of its intrinsic characteristics, may be regarded as having been specially designed and developed, also as a result of substantial modifications, for such purposes, this also being a matter for the referring court to determine.
- 45 It should be added that if, in the light of the foregoing considerations, the referring court should find that the product at issue in the main proceedings comes within the material scope of Article 296(1)(b) EC, to which Article 10 of Directive 2004/18 refers, it would be for that court to determine whether the Member State which seeks to take advantage of that Treaty provision can show that it is necessary to have recourse to the derogation provided for in that provision in order to protect its essential security interests (see, to that effect, *inter alia*, *Commission v Finland*, paragraph 49) and whether the need to protect those essential interests could not have been addressed within a competitive tendering procedure such as that specified by Directive 2004/18 (see, to that effect, *Commission v Italy*, paragraph 53).
- 46 Having regard to the foregoing considerations, the answer to the question referred is that Article 10 of Directive 2004/18, read in conjunction with Article 296(1)(b) EC, must be interpreted as authorising a Member State to set aside the procedures laid down by that directive in the case of a public contract awarded by a contracting authority in the field of defence for the acquisition of material which, although intended for specifically military purposes, also presents possibilities for essentially identical civilian applications only if that material, by virtue of its intrinsic characteristics, may be regarded as having been specially designed and developed, also as a result of substantial modifications, for such purposes, this being a matter for the referring court to determine.

Costs

- 47 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national 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 (Fourth Chamber) hereby rules:

Article 10 of 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, read in conjunction with Article 296(1)(b) EC, must be interpreted as authorising a Member State to set aside the procedures laid down by that directive in the case of a public contract awarded by a contracting authority in the field of defence for the acquisition of material which, although intended for specifically military

purposes, also presents possibilities for essentially identical civilian applications only if that material, by virtue of its intrinsic characteristics, may be regarded as having been specially designed and developed, also as a result of substantial modifications, for such purposes, this being a matter for the referring court to determine.

[Signatures]