THE HIGH COURT

[2021] IEHC 212

[2020/369 JR]

BETWEEN

PAYZONE IRELAND LIMITED

APPLICANT

AND

NATIONAL TRANSPORT AUTHORITY

RESPONDENT

JUDGMENT of Mr. Justice Brian O'Moore delivered on the 24th day of March, 2021.

1. This is my judgment on a motion brought by the Respondent ('the N.T.A.') to dismiss these proceedings on one ground alone, namely that the Applicant ('Payzone') is not an eligible person within the meaning of Regulation 4 of the European Communities (Award of Contracts by Utility Undertakings) (Review Procedures) Regulations 2010 ('the Utilities Regulations') or Regulation 4 of the European Communities (Public Authorities' Contracts) (Review Procedures) Regulations 2010 ('the Public Contracts Regulations').

2. The proceedings relate to a tendering process conducted by the NTA in respect of a contract for the operation, maintenance and administration of the 'Leap Card', a contactless smart card used for public transport services in Ireland.

3. Payzone did not itself tender for the contract. Instead, Payzone agreed to participate in the tender of DXC Technology ('DXC') and a separate tender by Cubic Transportation Systems Limited ('Cubic'). However, when Cubic was awarded the contract, it then informed Payzone that the latter was not, after all, part of the successful tender and would therefore paly no part in the contract. Immediately on receiving this news, Payzone agitated with the NTA the issues which have lead to these proceedings.

4. The NTA accepts that, for the purpose of this application, it must accept the facts as set out by Payzone. I will therefore summarise the relevant facts as described in a very lengthy affidavit of Jim Deignan, the C.E.O. of Payzone. I will then set out the law, the arguments and my decision.

A. The Facts

5. On the 3rd of November 2018 the NTA issued a contract notice advertising the competition for the provision of services in connection with the Leap Card. Payzone was interested in the provision of the EPOS network, and becoming the EPOS network operator. This position is a crucial one in the operation of the Leap Card system, and the management of the EPOS network would account for about half of the value of the main contract. Payzone was also interested in performing the Payment Gateway Services.

6. The Information Memorandum for the competition, issued by the NTA, referred under the Definitions section to 'Candidate Member', which included 'the entity proposed as the EPOS Network Manager'. The full definition reads:-

> "(1) 'Candidate Member' means each member of the group where the Candidate is a group and for the avoidance of doubt includes any entity who it is proposed will

have primary responsibility for performing the operational services under the Contract and the entity proposed as EPOS Network Manager;

(2) 'EPOS' means a type of card accepting device operated by a sales agent used for topping-up or reloading other transactions involving smart cards;

(3) 'EPOS Network' means an EPOS Network Manager with a network of retail sales outlets;

(4) 'EPOS Network Manager' means the entity with responsibility for providing a consumer payment network (terminal devices, applications, infrastructure and payment gateways) and establishing and managing the EPOS Network. For the avoidance of doubt, the proposed EPOS Network Manager must be a Candidate Member (where not the Candidate itself) and must be named in the Submission."

7. Equally, the PQQ and the ITN emphasise the significance of the EPOS network operator; for example, the ITN (at section 1.5.9.) provides:-

> "The Contract requires that the Operator acts as the EPOS Network Operator, or subject to clause 41.4 of the Contract, appoints a third party to act as the EPOS Network Operator. For the avoidance of doubt, the proposed EPOS Network Operator must be named in the Tender. Note that where the EPOS Network Operator is not the Tenderer itself, the Tenderer should include with the Tender a confirmation from the EPOS Network Operator that they will provide the relevant services."

8. The same documents stress the importance of the Payment Gateway Services, which Mr. Deignan days were 'a critical part of the performance of the Contract'.

9. Mr. Deignan also outlines what he describes as the exclusivity prohibition (by which he means that the NTA prohibited any EPOS network operator from engaging with tenderers on an exclusive basis), the multiple participation requirements (where there were a number of candidate members, information on each must be provided), and the PQQ amendment restriction (while the NTA anticipated that there may be changes between the PQQ submission and the tender, in Mr. Deignan's view these changes must be done in accordance with the terms of the competition and must be otherwise lawful).

10. Mr. Deignan then summarises the progress of the PQQ stage of the competition as follows:-

> "75. PQQs were originally due to be submitted on 9 January 2019. However, on 13 December 2018, this deadline was extended to 23 January 2019.
>
> 76. The PQQ results were issued on 13 May 2019.
>
> 77. Both DXC and the Successful Tenderer were successful at the PQQ stage ('the Tenderers').

78. The Applicant understands that no other candidates qualified to participate in the subsequent negotiation stage."

11. Mr. Deignan then describes Payzone's participation in the competition. Its initial intention had been to partner exclusively with DXC, but DXC was told by the NTA on the 27th of December 2018 that:-

> "[t]he Authority is not minded to permit any Candidate to enter into an exclusive arrangement with [the Applicant]."

12. This was forwarded by DXC to Payzone on the 4th of January 2019. Mr. Deignan describes the reaction:-

> "Reasonably, my colleagues and I understood from this that the Respondent required the Applicant to engage with all candidates and tenderers, and further, that the Applicant was required by the Respondent to engage with all candidates and tenderers on an equal basis ('the Equal Engagement Requirement').
>
> It appeared to the Applicant that the Respondent was concerned that there would be a lack of competition if the Applicant (as the incumbent EPOS Network Operator) were permitted to be exclusive to one tenderer.
>
> The purpose of the Exclusivity Prohibition would have been defeated if the Applicant had been entitled to treat DXC and the Successful Tenderer differently. Accordingly, the Equal Engagement Requirement followed naturally from the Exclusivity Prohibition.
>
> In any event, the Equal Engagement Requirement was subsequently communicated expressly and on a number of occasions to the Applicant, as I will set out further below."

13. Payzone went on to engage further with the NTA in connection with the competition, attending an information day on the 8th of January 2019, an event in London on the 29th and 30th of January 2019, and discussions in April and May 2019. This lead to a string of correspondence in May and June 2019. I will set out the text of certain of these communications, as some emphasis is placed upon them by Payzone:-

> " 'Dear Mr Keegan 30th May 2019
>
> I refer to the competition for the Provision of Leap Operations Services as referenced above.
>
> We would request that you confirm whether or not and in line with previous assurances given to the Authority, that Payzone when sought is willing to engage with all potential tenderers in the competition.
>
> Yours sincerely,

Mark Bradwell'

'Dear Mark, 7th June 2019

I am replying to your note of 30th May 2019 in relation to the competition for the Provision of Leap Operations Services as referenced above. I can confirm that Payzone is willing to engage with all potential tenderers as previously assured.

Payzone will operate in a fair and consistent manner by providing all potential tenderers our complete payments platform incorporating Retail, Online and Mobile channels. We will provide each tenderer with the same proposition at the same price, ensuring there's no advantage given to any one tenderer. As you are aware our payment gateway is acquirer agnostic and currently routes transactions through AIBMS to a designated NTA bank account.

I would also like to assure you that Payzone commit to supporting the National Transport Authority throughout the competition and will follow any direction you provide during each stage, facilitating direct sessions with Tenderers or NTA where required.

I'm confident this approach will guarantee the strictest confidentiality of information throughout the competition whilst also ensuring all Candidates are treated equally and supported at all times.

Please do not hesitate to contact me should you have any other queries.

Yours sincerely,

Barry Keegan'

'Hi Barry, 14th June 2019

Many thanks for your response and nothing further required.

Regards,

Mark' "

14. Finally, on the 14th of June Mr. Keegan (of Payzone) met with the NTA, and assured it that Payzone was engaged with both Cubic and DXC and was offering both tenderers the same prices and services "in accordance with the Equal Engagement Requirement." Subsequently, Payzone wrote to the tenderers (on the 21st of August 2019) informing them of this, and both tenderers accepted the position.

15. Mr. Deignan then goes on to describe Payzone's involvement with DXC and with Cubic.

16. The engagement with DXC is set out as follows:-

"In compliance with the Exclusivity Prohibition and the Equal Engagement Requirement, as well as in compliance with the Multiple Participation Requirements, the Applicant offered to assist (and did assist) DXC with its PQQ submission and provided the information required by the IM and the PQQ.

The Applicant met with DXC on 8 January 2019 after the Information Day.

The Applicant provided DXC with a completed ESPD, bankers letter and projected experience for the purpose of its PQQ submission.

The Applicant had numerous other engagements with DXC following this until tender submission in October 2019. In particular, the Applicant worked through various points of clarifications, as DXC received them from the Respondent during the Competition, and the Applicant marked up aspects of the subcontract agreement for DXC.

Critically, the Applicant provided DXC with the same pricing and service proposition as it provided to the Successful Tenderer."

17. The engagement with Cubic is set out at greater length, but is summarised at paragraphs 118 to 124 of Mr. Deignan's affidavit:-

"In compliance with the Exclusivity Prohibition and the Equal Engagement Requirement, the Applicant offered to assist the Successful Tenderer with its PQQ submission.

The Successful Tenderer chose not to include the Applicant in its PQQ submission.

The Applicant believes that the Successful Tenderer did not at the time consider that there was any need for the Applicant to be referred to in its PQQ.

General Assistance Provided to the Successful Tenderer with its Tender

I say that in compliance with the Exclusivity Prohibition and/or the Equal Engagement Requirement:

(1) The Applicant arranged workshops and calls to provide detailed overview of its architecture, operation and management of the agent network;
(2) The Applicant shared learnings with the Successful Tenderer and discussed operating models in depth, providing the Successful Tenderer with a detailed understanding of the systems and operation;
(3) The Applicant provided the Successful Tenderer with the same pricing and service proposition that it offered DXC;
(4) The Applicant worked through points of clarifications as the Successful Tenderer received them from the Respondent;

(5) The Applicant spent considerable time reviewing the subcontract agreement and shared detailed feedback with the Successful Tenderer and marked up aspects of the subcontract agreement;

(6) The Successful Tenderer strongly supported the Applicant Arguments for a change in the structure of the pricing proposals and pressed these with the Respondent until the Respondent agreed.

Although the Successful Tenderer was familiar with the Applicant and aspects of the Contract, in the course of complying with the Exclusivity Prohibition and/or the Equal Engagement Requirement, the Applicant provided the Successful Tenderer with a deep understanding of the integration with the Leap systems and pricing in relation to the EPOS Network including the payment gateway service.

The Successful Tenderer utilised this information to assist it in formulating the qualitative aspects of its submission Tender.

The Applicant's engagement with the Successful Tenderer also provided the Successful Tenderer with intelligence in relation to how best to price its Tender, including in relation to both the EPOS Network and the Payment Gateway Services."

18. While I do not intend to set out in detail the interaction between Payzone and Cubic, there is one theme which should be emphasised. Cubic had not included Payzone in its PQQ submission. Despite this, after the PQQ submissions had been made Cubic asked Payzone for indicative pricing and other information; after being shortlisted, it then worked closely with Payzone in order to perfect its tender. Mr. Deignan gives evidence (at paragraph 168 of his affidavit) that:-

> "Given the significant inputs and interaction that the Applicant had with the Successful Tenderer up to 21 October 2019, as I have already set out above, the Applicant clearly understood that it had been included in the Successful Tenderer's Tender also."

19. On this account, one can readily understand why Payzone feels aggrieved at the process; however, as I read the evidence of Mr. Deignan, Payzone is at least as unhappy with Cubic as with the NTA, if not more so. Had Payzone been included in the Cubic tender, as Cubic had lead it to believe was the case, these proceedings would never have issued.

20. Mr. Deignan goes on to describe events after the tender submission and, more relevantly, the NTA decision and what happened subsequently. Put briefly, on the 7th of April 2020 DXC told Payzone that the DXC tender had failed. Two days later, Mr. Keegan contacted Cubic, in the misguided belief that Payzone was part of the winning tender. Given that Cubic had not included Payzone, there was a grim inevitability about what then happened. Contact from Mr. Keegan on the 9th of April, 30th of April and the 7th of May 2020 went unanswered, and messages went unreturned, On the 11th of April 2020, Cubic emailed Payzone saying:-

"[a]pologies for missing your call. Unfortunately we cannot communicate until a contract is signed."

21. It was only after an email of the 11th of May 2020 (in which Payzone said that it would contact the NTA directly should Cubic not reply) that there was any meaningful communication from Cubic. On the 12th of May 2020 Payzone was told by Cubic that it had not, after all, been included in the successful tender. This call, according to Mr. Deignan, "caused serous alarm and disappointment within [Payzone] […]". The following day, Payzone commenced correspondence with the NTA. This exchange of correspondence continued until the 10th of June 2020. It did not resolve matters. These proceedings issued that very day.

B. The Claim

22. The primary relief sought by Payzone is set out at paragraph (1) of its Notice of Motion:-

"(1) An order pursuant to Regulation 8(1)(b) and Regulations 9(1) and/or Regulation 9(5) of the European Communities (Public Authorities' Contracts)(Review Procedures) Regulations 2010 (SI 130/2010) ('the Public Contracts Remedies Regulations') and/or the Utilities Remedies Regulations setting aside or permanently suspending the decision of the Respondent ('the Decision') to award a contract for the provision of Leap Operations Services to Cubic Transportation Systems Limited ('the Successful Tenderer')."

23. The claim is one brought under Order 84A of the Rules of the Superior Courts. Order 84A rule 6(2) provides:-

"Where a contracting authority or notice party opposes the application on the ground that the applicant is not an eligible person (within the meaning of Regulation 4 of the European Communities (Public Authorities' Contracts) (Review Procedures) Regulations 2010 or, as the case may be, Regulation 4 of the European Communities (Award of Contracts by Utility Undertakings) (Review Procedures) Regulations 2010), that contracting authority or notice party may apply to the Court for an order dismissing the application by motion on notice, grounded on an affidavit, in the proceedings commenced by Originating Notice of Motion, which motion may be made returnable for the return date of the Originating Notice of Motion."

24. The issue between the parties, therefore, is whether Payzone is an eligible person within either set of the relevant Regulations.

25. Regulation 4 of the Utilities Regulations reads:-

"For the purposes of these Regulations, a person is an eligible person in

relation to a reviewable contract if the person—

(a) has, or has had, an interest in obtaining the reviewable contract, and

(b) alleges that he or she has been harmed, or is at risk of being harmed, by an infringement, in relation to that reviewable contract, of Community law in the field of public procurement, or of a law of the State transposing that law."

26. As counsel for the NTA submit, there are a number of ways in which proceedings taken by an eligible person stand out.

27. Only an eligible person can seek reliefs under Regulation 8, 9 and 13; such reliefs are sought by Payzone in these proceedings.

28. An application by an eligible person under Regulation 8 triggers an automatic suspension of the contract under challenge. Legal challenges brought outside the Utilities Regulation by persons other than eligible persons do not give rise to such an automatic suspension.

29. An eligible person must proceed under Order 84A. As against that, proceedings under Order 84A do not require the leave of the court provided, of course, that they are brought by an eligible person.

30. It is therefore critical to establish whether Payzone qualifies as an eligible person. On an ordinary reading of Regulation 4, it does not. Payzone at no time had an interest in obtaining the contract for the provision of Leap Operations Services. The evidence of Mr. Deignan makes it plain that this is so. Indeed, Mr. Deignan on several occasions draws a distinction between Payzone and the actual tenderers for the contract. It is impossible to read the affidavit of Mr. Deignan and come to the view that Payzone "has, or has had. an interest in obtaining the reviewable contract".

31. Counsel for Payzone, understandably in the light of the plain words of Regulation 4, emphasises the unusual facts of this case and the need for a purposive construction of the Regulation.

32. The facts of this case probably are quite unusual, but none of the underlying facts described by Mr. Deignan qualify Payzone as an eligible person. The closest that the unusual facts go in assisting Payzone is the designation of Payzone as a "Candidate Member" in the DXC tender. This description is unfortunate and inaccurate, and in any event did not persist through the tender process. Crucially, the description of Payzone as a participant cannot change the reality of its situation. Payzone did not apply to be shortlisted in the competition to be awarded the contract. It submitted no tender. It could never have been awarded the contract, not because of any rule preventing such an award but because it had never sought to win the contract. Payzone makes no claim that it should have been awarded the contract. Even now, Payzone does not say that it would compete for the contract in the event that it succeeds in these proceedings.

33. It should be noted that Regulation 4 requires not only that a claimant has suffered loss as a result of the way that a competition is run in order to establish itself as an eligible person; it must also have had an interest in being awarded the contract. Making out a case that such damage has been suffered, as Payzone does in this case, cannot in itself qualify it as an eligible person.

34. In analysing what constitutes an eligible person, I am not confined to the wording of Regulation 4. I am directed by both parties to a range of authorities, which I now consider.

35. The NTA relies on a sequence of cases before the CJEU. The first of these is C-470/99 *Universale-Bau* [2002], in which the Court referred at paragraph 71 and 72 to the interaction of domestic time limits and Community law:-

> "With regard to the condition laid down in the first indent of that provision, the Vergabekontrollsenat stated that it was apparent from EBS's statutes at the time of its establishment that it operated, on a commercial basis, sewage treatment installations. It states that such activities were not reserved or allotted to the public sector and that there was no indication in the said statutes that EBS was established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character.
>
> According to the findings of the Vergabekontrollsenat, a substantial change took place when EBS was made responsible for the operation of the city of Vienna's principal sewage treatment plant. In particular, in 1985 EBS entered into a lease with the city of Vienna, under which it undertook to manage the said sewage plant with staff supplied by the city of Vienna, which undertook to reimburse EBS the expenses occasioned by such personnel. Under two contracts made between the city of Vienna and EBS on 8 and 18 July 1996, the city of Vienna further undertook to transfer to EBS an appropriate global amount to cover the operating expenses. In that regard the Vergabekontrollsenat explains that EBS did not carry on that branch of its activities for profit. It was in fact an activity of general interest which the city of Vienna delegated to EBS and which was managed in such a way as to cover the expenses. The Vergabekontrollsenat concludes therefore that that activity is not of an industrial or commercial character."

36. The NTA emphasises the reference to "candidates and tenderers harmed by decisions [...]".

37. The second authority is C-410/01 *Fritsch, Chiari & Partner* [2003] at paragraph 34:-

> "It should be added that the fact that Article 1(3) of Directive 89/665 expressly allows Member States to determine the detailed rules according to which they must make the review procedures available to any person having or having had an interest in obtaining a particular public contract and who has been or risks being harmed by an alleged infringement none the less does not authorise them to give the term 'interest in obtaining a public contract' an interpretation which may limit the effectiveness of that directive (see, to that effect, *Universale-Bau*, cited above, paragraph 72)."

38. These authorities do not really carry the matter very far. The third authority, C-230/02 *Grossman Air Service* [2004], is more helpful. In that case, the way in which the

competition was framed meant that Grossman could not provide all the services required, but it wished to provide some. Grossman's case is summed up at paragraphs 15 and 17 of the judgment:-

> "By application dated 19 October 1998, posted on 23 October and received at the Bundesvergabeamt on 27 October 1998, Grossmann applied to have the contracting authority's decision to award the contract to Lauda Air set aside. In support of its application Grossmann claimed essentially that the invitation to tender had been tailored from the beginning to one tenderer, namely Lauda Air.
>
> […]
>
> As regards the absence of interest, the Bundesvergabeamt found that since it did not have large aircraft available to it, Grossmann was not in a position to provide all the services requested, and that it had not submitted a tender in the second award procedure for the contract at issue."

39. The Court continued at paragraph 21:-

> "The Bundesvergabeamt thus finds that Grossmann allowed 14 days to elapse between notification to it of the decision awarding the contract (9 October 1998) and the institution by Grossmann of proceedings before the Bundesvergabeamt (23 October 1998), without any request for conciliation being lodged with the B-VKK (a request which would have caused the four-week time-limit laid down in Paragraph 109(8) of the BVergG, during which the contracting authority may not award the contract, to begin to run) or, in the case of a failure of the conciliation process, without the B-VKK being requested to grant interim measures and to set aside the decision awarding the contract. Therefore, according to the national court, the question arises whether Grosmann can establish an interest in bringing proceedings, in accordance with Article 1(3) of Directive 89/665, since as it was not in a position to provide the services in question, owing, it claims, to provisions in the documents relating to the invitation to tender that are discriminatory within the meaning of Article 2(1)(b) of the Directive, it did not submit an offer in the contract award procedure at issue."

40. The analysis of the Court is to be found at paragraphs 27 to 29:-

> "In that sense, as the Commission pointed out in its written observations, participation in a contract award procedure may, in principle, with regard to Article 1(3) of Directive 89/665, validly constitute a condition which must be fulfilled before the person concerned can show an interest in obtaining the contract at issue or that he risks suffering harm as a result of the allegedly unlawful nature of the decision to award that contract. If he has not submitted a tender it will be difficult for such a person to show that he has an interest in challenging that decision or that he has been harmed or risks being harmed as a result of that award decision.

> However, where an undertaking has not submitted a tender because there were allegedly discriminatory specifications in the documents relating to the invitation to tender, or in the contract documents, which have specifically prevented it from being in a position to provide all the services requested, it would be entitled to seek review of those specifications directly, even before the procedure for awarding the contract concerned is terminated.
>
> On the one hand, it would be too much to require an undertaking allegedly harmed by discriminatory clauses in the documents relating to the invitation to tender to submit a tender, before being able to avail itself of the review procedures provided for by Directive 89/665 against such specifications, in the award procedure for the contract at issue, even though its chances of being awarded the contract are non-existent by reason of the existence of those specifications."

41. In other words, while it may be difficult for a party who has not submitted a tender to establish an interest in obtaining the contract at issue, it is possible to do so. A party does not have to submit a doomed tender in order to prove its interest in obtaining the relevant contract. However, the basic requirement (endorsed by Community law) of having an interest in obtaining the contract (or a version of the contract which is not skewed in favour of a rival) remains. This requirement is not diluted by the observations of the Court (at paragraph 36):-

> "In that regard, it is appropriate to recall that, as is apparent from the first and second recitals in the preamble, Directive 89/665 is intended to strengthen the existing mechanisms, both at national and Community level, to ensure the effective application of Community directives relating to public procurement, in particular at a stage when infringements can still be remedied. To that effect, Article 1(1) of that directive requires Member States to guarantee that unlawful decisions of contracting authorities can be subjected to effective review which is as swift as possible (see, in particular, Case C-81/98 *Alcatel Austria and Others* [1999] ECR I-7671, paragraphs 33 and 34, Case C-470/99 *Universale-Bau and Others* [2002] ECR I-11617, paragraph 74, and Case C-410/01 *Fritsch, Chiari & Partner and Others* [2003] ECR I-6413, paragraph 30)."

42. Payzone relies upon this paragraph to suggest that the Court is suggesting that the Member States must guarantee that any unlawful decisions will be amenable to swift effective review. However, this does not set aside the provisions of Article 1 (3) of the Directive that the review procedures invoked by Payzone in these proceedings be made available 'at least' to persons with an interest in obtaining the relevant contract. If it were otherwise, there would be no significance in Article 1(3) and, indeed, Regulation 4 would also be bereft of meaning.

43. The NTA places significant reliance on the Opinion of Advocate-General Stix-Hackl in Case C-129/04 *Espace Trianon,* at paragraphs 35 onwards:-

"35. *Under the Directive, standing must be afforded, therefore, to a person who has an interest in obtaining the contract which is to constitute the subject-matter of a review procedure. As regards standing and the interest which is necessary in that connection, it must be added that not every interest is sufficient to render an application for review admissible.*

[…]

37. It is true that the members of a consortium have an interest in the economic success of the consortium to which they belong. Nevertheless a member of a consortium is merely interested in the consortium being awarded the contract, not however in obtaining the contract itself.

[…]

39. Contrary to the Commission's argument, Member States are obliged as a matter of principle to grant standing to challenge a contract award procedure only to undertakings that have actually participated in that procedure.

40. It is true that there are exceptions to this rule, however those only apply in particular cases: thus participation in a contract award procedure cannot be imposed as a requirement if the contracting authority has not even conducted a formal contract award procedure. Equally, an undertaking has access to the remedies provided for by the Directive where the only reason for its non-participation was that the terms of the invitation to tender appeared to render its participation pointless.

41. According to the Court's case-law, the requirement of participation in the contract award procedure should be departed from therefore only in those cases in which participation was impossible or at the very least pointless. The decisive element is therefore that the cause of the impossibility of successful participation in a contract award procedure lies in the conduct of the contracting authority. Cases of impossibility must be distinguished, however, from those in which an undertaking does not even desire to participate in a contract award procedure. This also applies to the individual members of a consortium which do not desire to participate individually in a contract award procedure.

[…]

46. According to Community law, standing to bring proceedings must be accorded therefore to a person who also enjoys substantive rights. In the case of consortia, however, the rights conferred by the directives concerning the substantive law of public procurement are to be enjoyed by the consortia themselves. It is precisely the consortium which participates in the contract award procedure and appears as such in relation to third parties. Similarly, only it can constitute the addressee of a possible decision to award the contract.

47. Equally, the fact that national law also imposes upon the members of a consortium certain duties – possibly even towards third parties – may, as a matter of national procedural law, be decisive. Thus the principle that substantive rights and duties run parallel to remedies may acquire significance also under national law.

48. From the Community law perspective, the questions referred must be answered therefore in such a manner as to ensure that the Directive's aim of enforcing the rights which can be derived from the directives concerning the substantive law of public procurement is taken into account.

49. If that principle is applied to the main proceedings it leads then to the conclusion that the Directive provides remedies only for tenderers, in this case, therefore, the consortium. The main proceedings illustrate the typical situation concerning consortia, that is to say, that on account of their specialisation their members would be wholly unable to carry out the complete contract. It must be emphasised that they furthermore did not intend to do so.

50. The principle according to which rights run parallel to remedies would therefore tend to preclude the conclusion that under the Directive individual members as well should also be accorded standing."

44. Counsel for Payzone relies on the reference at paragraph 50 to rights running parallel to remedies, but again I do not think that the statement of this general proposition undermines the essence of the Opinion of the Advocate-General. Her view is clear; standing to challenge the award procedure is confined to undertakings which have taken part in the procedure with a view to obtaining the contract on offer. There are exceptions, but these necessarily apply only in particular cases.

45. A similar approach is taken by Hogan J. in *Copymoore (Number 1)* [2013] IEHC 230. Referring to *Grossman*, Hogan J. said (at paragraph 24):-

> "One might, of course, observe of these passages that the Court of Justice had merely stated that the 1989 Directive did not preclude national authorities from holding that entities which neither submitted a tender nor challenged discriminatory tender criteria during the process should not be regarded as eligible persons. Yet the clear implication of the decision in Grossmann Air Services is that the Directives positively preclude such entities from being regarded as eligible persons and I think in order to remain faithful to the underlying sentiments of the judgment that the decision must be read in this fashion."

46. He went on to consider the decision of the CJEU in *Espace Trianon* (at paragraph 25):-

> "It may also be observed that the Court of Justice applied these principles in Case C-129/04 *Espace Trianon* [2005] E.C.R. I-7805 in holding that that a Belgian procedural rule which required that all members of a tendering consortium must challenge the validity of a contract award if such challenge is to be regarded as

legally admissible did not unlawfully limit the availability of such an action contrary to Article 1(3) of the Remedies Directive. Here the Court again (at least) strongly implied that only persons who participated in the tender process have an interest in challenging the tender award. As it was the consortium which tendered (and not its individual members), if all members of that consortium did not maintain the challenge, it could not be said that the individual members had a continuing interest in maintaining the legal challenge to the outcome of the award.

47. His analysis of the facts of *Copymoore* itself follows. It is stark; the applicants' case, he found, "is fundamentally an administrative law challenge wrapped up in a challenge to a procurement award." In opening this part of the judgment in *Copymoore (Number 1)*, counsel for the NTA could not resist making the forgivable observation that this dispute "was essentially a commercial issue between [Payzone] and Cubic wrapped up as a procurement challenge."

48. I should also refer to two other passages in the judgment of Hogan J. He sets out the appropriate general approach at paragraphs 31 to 34:-

> "31. It is true that there may well be cases where an entity can challenge the contract award without having participated in the tender, but these cases are exceptional. Thus, for example, in *Ryanair v. Minister for Transport* [2009] IEHC 171 the successful bidder did not take up the contract and the applicant (which had not participated in the tender) maintained that the Minister was then obliged to organise a fresh tender in which it would be eligible to participate. While Finlay Geoghegan J. held that the applicant had no standing to make some generalised complaint about the conduct of a tender in which it had not participated (such as, for example, a complaint that the principle of equal treatment of tenderers was not observed), she did hold that the applicant had standing to make the case that the Minister was then obliged in these special circumstances to organise a fresh tender.
>
> 32. Similarly different considerations may apply where, for example, the failure properly to advertise the tender has prejudiced potential tenderers so that they fail to submit a bid. As Arrowsmith, Law of Public and Utilities Procurement (London, 2005) observes (at 1368):
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> > "…it is clear, as accepted in [*R. v. Avon C.C.*, *ex p. Terry Adams Ltd.* [1994] Env. L.R. 442] that standing can exist even when the claimant has not bid, if this has been caused by the purchaser's breach of the rules, such as an unlawful failure to advertise the contract or the use of unlawful specifications."
>
> 33. Yet it must also be acknowledged that the question of whether a particular entity satisfies the test of eligibility cannot always be determined in the abstract or by reference to some a priori formula such as whether a tender has actually been submitted. As the judgment of Finlay Geoghegan J. in *Ryanair* demonstrates,

allowance may sometimes have to be made for the nature of the tender irregularity alleged before this question can be completely determined.

34. What, then, are the nature of the irregularities alleged here? It is this question to which we may next turn."

49. Finally, Hogan J returns to the general approach to be taken by the Court in coming to his conclusions at paragraphs 43 and 44:-

"43. In summary, therefore, it can be said that, generally speaking, an applicant who wishes to challenge the outcome of a tender award must have participated in that process in order to be accounted an "eligible person" for the purposes of the 2010 Regulations with standing to challenge that award. Exceptions may, however, have to be made for special cases such as where the failure to advertise properly may have resulted in a potential tenderer not submitting a tender.

44. In the present case the applicants consciously did not submit a tender even though they knew of the competition. In the light of *Grossmann Air Services* it must be presumed that they are not eligible persons, absent such exceptional circumstances. There are, however, no such exceptional circumstances in the present case because, unlike the facts of *Lämmerzahl*, the applicants' complaints in relation to the contracts' award notice in February 2012 could not, even if well founded, have possibly prejudiced them."

50. In *Copymoore (Number 2)* [2016] IEHC 709 McDermott J. described the applicable principles:-

"80. It is clear from the *Grossmann* case that an applicant must establish that it is eligible to bring proceedings on the basis that it has or had an interest in obtaining the reviewable public contract. The Member State has an obligation to grant standing to those who have participated in the tendering process. Those who have not done so are not entitled to standing save in exceptional circumstances where the applicants' successful participation in the process is made impossible due to the conduct of the Contracting Authority for example by setting unlawful requirements. The consequence of the illegality for the applicant must be established on the evidence. This will vary from case to case but an applicant must demonstrate a sufficient interest in the proposed tender (*Student Transport Scheme Ltd. v. Minister for Education and Skills* [2012] IEHC 425; *Ryanair v. Minister for Transport* [2009] IEHC 171; *Copymoore and others v. Commissioners of Public Works of Ireland (No. 1)* [2013] IEHC 230)."

51. In this case, no argument is made by Payzone that its 'successful participation I the [tendering process] is made impossible due to the conduct of the [NTA]'.

52. The CJEU, its Advocate General, and this Court have all interpreted the phrase "eligible person" in a consistent way. In doing so they appear to me to have applied the

appropriate purposive construction of the relevant legislation. On these authorities, and on the wording of the relevant Regulations, Payzone is not an eligible person within the meaning of Regulation 4. I now consider the submissions of Payzone as to why, notwithstanding the clear import of all the only case law on the subject, Payzone qualifies to bring these proceedings under Order 84A.

53. Firstly, it is argued that Payzone had a high level of participation in the contract award procedure. However, the form of participation must be in the context of having an interest in obtaining the relevant contract. That was not the case here, regardless of the intensity of Payzone's engagement with either tenderer.

54. Secondly, it is argued that the nature of the tender irregularity is relevant. This is certainly true. However, the nature of the alleged irregularity has only been found to be a key consideration when that irregularity explains why the challenger did not in fact seek to be awarded the contract. That is no mere coincidence; the need to establish such an irregularity is entirely consistent with the wording of the relevant legislation (either at Community or national level) and with the case law itself; *Grossman, Espace Trianon, Copymoore (Numbers 1 and 2).*

55. In making this submission, Payzone's counsel relies on a passage on the rights of subcontractors in Arrowsmith (The Law of Public and Utilities Procurement, 3rd Edition) and on the decision in C-91/08 *Wall AG* [2010]. However, I accept the submissions of counsel for the NTA that these authorities cannot displace the weight of authority against this argument. Wall AG is not a case about the Remedies Directives, and the reference in Arrowsmith is of limited advantage to Payzone as none of the irregularities of which complaint is made in these proceedings arise from breach of any provisions put in place to protect subcontractors.

56. Thirdly, Payzone says that it has a right of action to seek annulment of the decision to award the contract to Cubic, and that it also has a right to claim damages for the wrongs done to it. This may well be true, but the current proceedings brought by Payzone is in the form of an application for judicial review made under Order 84 A. In order to maintain the form of challenge which Payzone has put forward, it must be an eligible person within the meaning of Regulation 4. I was made aware at the hearing that Payzone has also launched other proceedings in respect of the contract, under Order 84.

57. These other proceedings, for which leave was granted by Meenan J. on the 29th of June 2020, appear to seek very similar reliefs to those sought in these proceedings. Notably, damages and orders setting aside the award of the contract are sought in both actions. If the Order 84A proceedings are dismissed because Payzone is not eligible to bring them, the appropriate forum in which these "stand alone" claims can be agitated are the Order 84 proceedings; I take it that these latter proceedings were commenced for that very reason.

58. Equally, the reliance by Payzone on the principles of equivalence and effectiveness rings somewhat hollow when one considers that Payzone has commenced these other

proceedings, which are hanging fire until my judgment on the NTA application to strike out the Order 84A claim. The fact that Payzone may have sufficient interest to commence the Order 84 action does not mean that it qualifies to bring the current claim. Equally, Payzone itself must believe that effective and rapid remedies are available to Payzone for any harm caused to it as an "economic operator" as it has begun proceedings seeking such remedies. Any entitlement to effective remedy is not undermined by the fact that certain aspects of the Order 84A procedure (such as the automatic suspension) do not apply to the Order 84 procedure. The specific example of ineffectiveness given in Payzone's written submissions (that Payzone is steered to "a slower system of remedies, under the 3-month Order 84 time limit rather than the 30-day Order 84A time limit") is unimpressive. It was open to Payzone to apply for relief within 30 days (or three days) if it wished to; its speed of action is not dictated by the maximum amount of time it had to move.

59. Certain of the arguments contained in Payzone's written submissions veer between submissions as to the interpretation of the Directive and the Regulation and submissions as to what is left in this action even if Payzone is not an eligible person. Sometimes the same arguments are repeated in respect of both issues. A number of these arguments were not pressed in the oral submissions, notwithstanding their comprehensive nature. I have considered carefully all the arguments made on behalf of Payzone, and have tried to set out (sometimes briefly) the reasons why I have come to the decision that I have reached having regard to the main arguments put forward by Payzone. I do not think that, either on a literal or purposive reading of Article 1(3) or Regulation 4, Payzone qualifies as an eligible person. As I read them, this conclusion is consistent with all of the authorities (both European and Irish). I also note that, despite a passing remark in Payzone's submissions, there is no challenge in this action to the transposition of any European Directives into Irish law. It follows that the NTA is entitled to an order in terms of paragraph (3) of the Notice of Motion. While I have expressed the view that an order in terms of paragraph (3) leads naturally to an order in terms of paragraph (4), it occurs to me that the terms of paragraph (4) might profitably be clarified. For example, nothing ordered by me in this action should determine the Order 84 claim and I would not intend to do so.

60. I will therefore list this action for 11am on the 25th of March 2021 to finalise the orders to be made in this motion.